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No. 02 - 14

In The
# Supreme Court of the United States

NICHOLAS RUSSO,

*Petitioner,*

v.

STATE OF CONNECTICUT,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. DID THE CONNECTICUT SUPREME COURT INCORRECTLY HOLD THAT THE STATE LEGALLY SEARCHED AND SEIZED THE CONFIDENTIAL MEDICAL RECORDS OF THE PETITIONER, DETECTIVE NICHOLAS RUSSO, PURSUANT TO THE FOURTH AMENDMENT OF THE UNITED STATES?

II. DID THE TRIAL COURT CORRECTLY HOLD THAT THE STATE FAILED TO PROVE THAT BROWN RECEIVED PROPER CONSENT BEFORE HE SEARCHED THE PETITIONER'S CONFIDENTIAL MEDICAL RECORDS?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Nicholas O. Russo, respectfully petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court.

## OPINIONS BELOW

The Opinion of the Connecticut Supreme Court filed February 19, 2002, is reported at 259 Conn. 436, 790 A.2d 1132 (2002). It is reproduced at App. 1-58. The Order of the Connecticut Supreme Court denying the Petitioner's Motion for Reconsideration En Banc, dated March 28, 2002 is reproduced at App. 69.

The Opinion of the Connecticut Superior Court, filed August 15, 2002, is reported at 2000 WL 1228004 (Conn. Super. Ct. 2000). It is reproduced at App. 59-68.

## STATEMENT OF JURISDICTION

The Connecticut Supreme Court issued its opinion on February 19, 2002. Petitioner filed a Motion for Reconsideration En Banc which was denied on March 28, 2002. The supervisory jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

21 U.S.C. § 923(g)

21 U.S.C. § 880

21 U.S.C. § 873(a)

21 C.F.R. § 1316

21 C.F.R. § 1316.02

21 C.F.R. § 1316.05

21 C.F.R. § 1316.06

21 C.F.R. § 1316.08

21 C.F.R. § 1316.13

CONN. GEN. STAT. § 1-210(b)(2)

CONN. GEN. STAT. § 21a-261(d)

CONN. GEN. STAT. § 21a-265

CONN. GEN. STAT. § 21a-274

CONN. GEN. STAT. § 38a-976

The relevant portions of these provisions are reprinted in App. 75-103.

## STATEMENT OF FACTS[1]

The Petitioner, Nicholas Russo, was a detective assigned to the Crimes Against Persons Division of the Hartford Police Department. The Petitioner was also, at the time of his arrest, a deputized federal marshal working on the Federal Gang Task Force. In January 1997 the Petitioner, Detective Nicholas Russo, missed three (3) days of work due to illness. When Detective Russo returned to work he voluntarily submitted a note to his superiors at the Hartford Police Department from his physician, Doctor Santo Buccheri, stating that the Petitioner had been treated for influenza. Upon receipt of the sick note, Sergeant Charles Lilley ("Sgt. Lilley") and Lieutenant David Kenary ("Lt. Kenary") of the Hartford Police Department called Dr. Buccheri to investigate the sick note.

Following these conversations with Dr. Buccheri, Lt. Kenary contacted the Drug Enforcement Administration ("DEA") in January 1997 and spoke to DEA agents Frank DeCarlo and Kurt Reid. While Agents DeCarlo and Reid would not help Lt. Kenary, they offered to have Diversionary Investigator Marcus Brown ("Brown") contact him. Lt. Kenary called Brown instead, purportedly to discuss his concerns over Dr. Buccheri's prescription practices. R. 60.

Immediately following this conversation, Lt. Kenary and Brown met on September 7, 1997 to discuss the "investigation." R. 60. Brown alleged that during these conversations, Lt. Kenary asked to be informed if the

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[1] The statement of facts is inclusive of all facts presented in the argument.

Petitioner's "name came up" during the investigation. R. 61. Lt. Kenary also told Brown that he believed the Petitioner may have a drug problem because the Petitioner had previously participated in Accelerated Rehabilitation ("AR"). *Id.* From this point forward, however, the criminal investigation focused solely on the Petitioner. Dr. Buccheri was never investigated.

While admitting that no statutes or federal regulations authorized his actions, Brown pursued the criminal investigation[2] of the Petitioner by conducting unauthorized "surveys" of the Petitioner's prescription records without a warrant at a number of area pharmacies on October 31, 1997. R. 61. These "surveys" involved the disclosure of the Petitioner's confidential prescription records. R. 61. The records revealed the type of medication and dosage that Dr. Buccheri had prescribed to the Petitioner as his patient. *Id.* Following these initial searches, Brown and the investigative team,[3] again without a warrant or subpoena, seized the Petitioner's prescriptions from the pharmacies and turned them over to the Hartford State's Attorney's Office. *Id.* From its inception, this criminal investigation was predicated only on the information Brown received from Lt. Kenary of the Hartford Police Department, which consisted solely of the Petitioner's prior participation in AR. R. 65.

The purported reason for beginning the investigation was to investigate the prescription practices of Dr. Buccheri. R. 60-61. However, instead of investigating the

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[2] At this point the investigation was a joint investigation involving Brown, the Hartford State's Attorney's Office and the Hartford Police Department.

[3] The investigative team included the State's Attorney's Office (Hartford State's Attorney Thomas Brown and his subordinates, including Inspector Skinner was specifically mentioned in testimony) and the Hartford Police Department (Sergeant Hajdasz (spelled Haydash in the transcript) and Lt. Kenary were specifically mentioned in testimony), and *did not* include the State Department of Consumer Protection. R. 62.

doctor,[4] Brown searched the Petitioner's records, intending to report any information he found on the Petitioner to Lt. Kenary. R. 62. During these "surveys" and seizures, Brown did not request any doctor profiles and only searched the Petitioner's records. R. 64. However, while part of the searches involved running patient profiles[5] of the Petitioner, Brown never requested a similar profile of Dr. Buccheri despite the fact that he could have performed the same type of "profile" using only the doctor's name, a "doctor profile." R. 64. Therefore, the searches of the pharmacies began and ended only with the Petitioner's medical records. Brown conducted these searches without a reasonable belief that the searches would reveal anything. R. 62-63.

Brown did not have a warrant or subpoena, did not present a written notice of authority to inspect, did not receive informed consent from the pharmacists, or have reasonable suspicion to believe that he would find anything incriminating when he conducted these unauthorized searches. R. 61, 62, 69. Brown testified that there were no extenuating circumstances requiring him to immediately search the pharmacies without first seeking a warrant or subpoena and instead relied on his position with the DEA to search the Petitioner's medical records at the pharmacies. R. 62.

Brown's authority and job description as an investigator with the DEA is derived from the Code of Federal Regulations and the United States Code and does not include police powers.[6] Instead, Brown testified and the State argued that the regulations governing pharmacies did not apply in this case because since the records were seized from the third party pharmacies that the Petitioner

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[4] While Brown opened an investigation file naming the Petitioner as the "target", he never opened a file on Dr. Buccheri. R. 63. There was no investigation of Dr. Buccheri. *Id.*

[5] Patient profiles include all the information contained in the original prescriptions.

[6] *See* 21 C.F.R. § 1316.02 at App. 75.

did not have a reasonable expectation or privacy in those records. *State v. Russo*, 2000 WL 1228004 at *1 (Conn. Super. Ct. Aug 15, 2000). During direct examination, however, Brown testified that if the pharmacists did not comply with his requests that his agency could initiate the revocation of the pharmacy's DEA registrations, with this course of action being consistent with the regulatory scheme. R. 62.

Based on these facts, the Petitioner moved to suppress the evidence seized from the pharmacy searches and any evidence derived from these searches. The trial court (Schimelman, J.) held that because prescription records and the information contained in them "pertain to and provide insight into an individual's health, be it psychological or physical . . . prescription records fall within the purview of the right of confidentiality, and thus, the right of privacy, for all individuals." *Russo*, 2000 WL 1228004 at *5. Having found that the Petitioner had the requisite expectation of privacy to challenge the search, the trial court proceeded with the hearing on the motion to suppress.

During the subsequent hearing on the Motion to Suppress (September 14-15, 2000), the trial court held, as a finding of fact, that from the "inception, Detective Russo was a target of a criminal investigation," R. 65, and that Brown visited the pharmacies as part of a criminal investigation, not for "any other authorized DEA reason." R. 64. The trial court also found that the State used Brown's administrative authority as a "guise" for obtaining evidence in a criminal investigation. R. 70. Accordingly, the trial court held that this type of conduct was "precisely the reason for the exclusionary rule," and granted the Petitioner's Motion to Suppress. R. 70. Pursuant to the trial court's order, the State dismissed the charges against the Petitioner and initiated this appeal. The Petitioner subsequently sought transfer of the appeal to The Connecticut Supreme Court because of the serious constitutional issues involved.

The Connecticut Supreme Court (Palmer, J.) reversed the judgment of the trial court to grant the Petitioner's motion to suppress. The State did not contest and the court affirmed the trial court's findings of fact, including the fact that Brown was not conducting an administrative inspection of the pharmacies but was rather "acting in pursuance of a criminal investigation of the Petitioner in cooperation with the Hartford Police Department." *State v. Russo,* 259 Conn. 436, 443-444, 790 A.2d 1132, 1139-1140 (2002). However, the court did find fault with the legal conclusions drawn by the trial court.

The court held that while the Petitioner possessed a constitutionally protected privacy interest in his medical records, that those rights were not violated under the facts of his particular case. *Russo,* 259 Conn. at 446, 790 A.2d at 1140. The court reasoned that, while a majority of the federal Circuit Courts of Appeals have concluded that this constitutionally protected right to privacy extends to medical records, this protection is not absolute. *Id.* at 460, 790 A.2d at 1148. "[T]he reasonableness of a person's expectation that his or her personal or intimate medical information will not be disclosed depends upon the circumstance underlying the particular disclosure." Relying upon *Whalen v. Roe,* 429 U.S. 589 (1977), the court held that the statutory scheme affords to law enforcement officials access to prescription records for controlled substances without a warrant while simultaneously insuring that these records are not disseminated to the general public. *Russo* at 465-466, 790 A.2d at 1151-1152. The court went on to state that such searches are not in violation of the federal constitution due to the state's strong interest in regulating the distribution of harmful drugs and the resulting reduced privacy interest in those records that an individual would hold. *Id.* at 470-72, 790 A.2d at 1155-55. The Petitioner subsequently filed a Motion for Reconsideration En Banc on February 19, 2002, which was denied by the court on March 28, 2002.

## ARGUMENT

### I. THE CONNECTICUT SUPREME COURT INCORRECTLY HELD THAT THE STATE LEGALLY SEARCHED AND SEIZED THE CONFIDENTIAL MEDICAL RECORDS OF THE PETITIONER, DETECTIVE NICHOLAS RUSSO, PURSUANT TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

#### A. Standard of Review

"A ruling on the merits of a federal question by the highest state court leaves the federal question open to review in this Court." *Franks v. Delaware*, 438 U.S. 154, 161-162 (1978) (ruling that the question was open to review because the Supreme Court of Delaware, disposed of petitioner's Fourth Amendment claim on the merits). When evaluating the trial court's actions in a motion to suppress the standard of review is clear:

> [The] standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision. . . .

*State v. Blackman*, 246 Conn. 547, 553, 716 A.2d 101, 105 (1998), *quoting State v. Colvin*, 241 Conn. 650, 656, 697 A.2d 1122 (1997) (citations omitted; internal quotation marks omitted).

To determine whether a motion to suppress should be granted, the initial inquiry is whether "the challenged evidence is in some sense the product of illegal government activity." *United States v. Crews*, 445 U.S. 463, 471 (1980). Under the exclusionary rule to the Fourth Amendment, evidence must be suppressed if it is found to

be the "fruit" of some prior illegal action by police. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

> As subsequent cases have shown, the exclusionary sanction applies to any 'fruits' of a constitutional violation – whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention. *Crews*, 445 U.S. at 470.

### B. The Petitioner Had Standing To Challenge The Illegal Search And Seizure Of His Confidential Medical Records Pursuant To The Fourth Amendment to The United States Constitution.

Under the Fourth Amendment to the United States Constitution, a search conducted without a warrant is *per se* unreasonable. *See Steagald v. United States*, 451 U.S. 204, 211 (1981); *Katz v. United States*, 389 U.S. 347, 357 (1967).

To challenge an illegal search and seizure under the Fourth Amendment, a person must establish that there is a reasonable expectation of privacy in the subject matter of the search, and that this expectation is one which society accepts as reasonable. *Katz*, 389 U.S. at 353. Moreover, this privacy expectation is not defined by physical location or the presence of a property interest, but is instead subjective and attaches to the person, not the place. *Id.* at 351-353. The Court stated in *Katz* that "once it is recognized that the Fourth Amendment protects people – and not simply 'areas' – against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

This Court has placed the issue of "standing" within the purview of substantive Fourth Amendment law. *Minnesota*

*v. Carter*, 525 U.S. 83, 88 (1998); *Rakas v. Illinois*, 439 U.S. 128, 139-140 (1978). Under this regime a person cannot establish standing solely on the basis that the person was the "target" of the search. *Rakas*, 439 U.S. at 136. Rather, the individual must establish that there is a reasonable expectation of privacy in the object of the search. Therefore, while a search of a third party's premises does not automatically allow an aggrieved party to vicariously assert Fourth Amendment protections when that person is the target of the search, *Alderman v. United States*, 394 U.S. 165 (1969), the individual may assert protection of the Fourth Amendment if a reasonable expectation of privacy in the third party premises, or the object of the search, is established. *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas*, 439 U.S. 128; *Murphy v. Townsend*, 1999 WL 439468 at *2 (9th Cir. 1999).

### 1. The Petitioner Had a Subjective Expectation of Privacy in His Confidential Medical Records Under The Fourth Amendment To The United States Constitution.

Under the regime described above, a Petitioner need only establish a legitimate expectation of privacy in the prescription records to challenge the search and seizure. The fact that they were in the possession of a third party was not a bar on the Petitioner's assertion of his Fourth Amendment rights. *Salvucci*, 448 U.S. 83; *Rakas*, 439 U.S. 128; *Murphy*, 1999 WL 439468 at *2.

This Court and other courts have clearly recognized a reasonable and legitimate expectation of privacy in one's prescription records and medical information. The United States Supreme Court held in *Whalen*, a case involving the disclosure of prescription information, that there exists in the United States Constitution a right to privacy protecting the individual interest in avoiding disclosure of personal matters. *Id.*, 429 U.S. at 598-600. The Third Circuit Court of Appeals has stated that, "[it] is indeed clear beyond peradventure that the Constitution embodies a

promise that a certain private sphere of individual liberty will be kept largely beyond the reaches of government . . . and as courts have held, medical records are clearly within this constitutionally protected sphere." *In Re Search Warrant (Sealed)*, 81 F.2d 67, 71 (3d Cir. 1987), *cert. denied*, 483 U.S. 1007 (1987) (internal quotations omitted); *see also Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999) (holding that even an inmate has a right of privacy in his medical records); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1310 (5th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988) (stating that patients have a privacy interest in their medical records); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (stating that there can be no question that medical records are well within the ambit of materials entitled to privacy protection). The Ninth Circuit has held that there is a legitimate expectation of privacy in one's prescription records under the Fourth Amendment, even when those records are obtained from a third party. *Murphy*, 1999 WL 439468 *2. The Second Circuit Court of Appeals has also explicitly held that people have a right to privacy in their personal medical information. *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994). The court stated: "[e]xtension of the right to confidentiality to personal medical information recognizes that there are few matters that are quite so personal as the state of one's health and few matters the dissemination of which would prefer to maintain greater control over." *Id.*, 15 F.3d at 267.

In fact, the Connecticut Supreme Court conceded that the majority of the federal Circuit Courts of Appeals has extended the constitutional right to privacy to medical records. *Russo* at 459, 790 A.2d at 1148. *See, e.g. Herring v. Keenan,* 218 F.3d 1171 (10th Cir. 2000); *Doe v. Southeastern Pennsylvania Trans. Auth.,* 72 F.3d 1133 (3d Cir. 1995); *Anderson v. Romero,* 72 F.3d 518 (7th Cir. 1995); *Doe,* 15 F.3d 267 (2d Cir. 1994); *Doe v. Atty. Gen. of the United States,* 941 F.2d 780 (9th Cir. 1991); *Harris v. Thigpen,* 941 F.2d 1495 (11th Cir. 1991). *Contra Jarvis v. Wellman,* 52 F.3d 125 (6th Cir. 1995); *Borucki v. Ryan,* 827 F.2d 836 (1st Cir. 1987). The states have likewise wrestled with this

issue and come to varying conclusions as to the existence of a privacy right for medical records under the Fourth Amendment. *See Commonwealth v. Lipomi,* 385 Mass. 370, 432 N.E.2d 86 (1982) (while warrantless inspections are permitted conditional upon the existence of limiting regulatory scheme, the motion to suppress was affirmed because the warrant pursuant to which the inspection of the pharmacy was performed was insufficient in that it failed to specify the purpose and property subject of the inspection); *Stone v. Stow,* 64 Ohio St. 3d 156, 593 N.E.2d 294 (1992) (because the pharmaceutical industry is heavily regulated, the statutory regulations did not infringe upon the constitutional right of privacy or the Fourth Amendment); *Olson v. Florida*, 287 So. 2d 313 (Fla. 1973) (the state pharmacy statute did not authorize warrantless searches for prosecutions under state drug statutes); *Appeal of Morgan (New Hampshire Board of Pharmacy),* 144 N.H. 44, 742 A.2d 101 (1999) (search of a pharmacy satisfied the administrative search exception to warrantless searches because there was a substantial government interest); *State v. Welch,* 160 Vt. 70, 624 A.2d 1105 (1992) (The state had the power to engage in a warrantless search of Petitioner individual's pharmacy records and the record demonstrated that the state did not use the product of an involuntary statement in its investigation).

None of these cases have held that the existence of a regulatory scheme requires negating a reasonable expectation in one's medical records. The State, however, seems to analogize prescription records to third party disclosures involving bank records, telephone records and garbage[7] while overlooking the unique and intimate nature of prescriptions and their inherent differences from bank and

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[7] *See Russo,* 2000 WL 1228004 at *4-5. The trial court discusses the different natures of pharmacy records in comparison with bank and telephone records, and distinguishes *State v. DeFusco*, 224 Conn. 627, 620 A.2d 746 (1993) in which the Connecticut Supreme Court held that citizens hold no privacy right in their garbage.

telephone records. In making this argument the State relies primarily on case law which is incompatible with the facts of this case. *Russo,* 2000 WL 1228004 at *4-5.

In *United States v. Miller*, 425 U.S. 435 (1976), agents from the Alcohol, Tobacco and Firearms Bureau, *after* obtaining a subpoena duces tecum, gathered the Petitioner's financial records from his bank. At the time the subpoena was issued, the Petitioner was the subject of a grand jury investigation. In finding that the Petitioner did not have a privacy expectation in his financial records, the Court first looked at the *nature of the documents* to determine whether there was a legitimate expectation of privacy in their contents. *Miller*, 425 U.S. at 442. The Court went on to hold that the records were "*not confidential communications* but negotiable instruments to be used in commercial transactions." *Id.,* 425 U.S. at 442 (emphasis added). The nature of medical records surely differs from those of the bank records considered in *Miller*, for they contain personal information that a patient would not reasonably expect to be shared with others beyond his or her medical care providers. In addition, even if bank and pharmaceutical records can be found compatible on some level, the fact that the agents in *Miller* did receive a subpoena for the relevant bank documents distinguishes that case from the present case.

The State also cites *Smith v. Maryland*, 442 U.S. 735 (1979). This case, like *Miller*, is easily distinguishable. *Smith* involved the use of a "pen register" by police, without a warrant, to record the telephone numbers dialed to a witness's home. The Court, in holding that the Petitioner did not have an expectation of privacy in the numbers he dialed, found that the pen register disclosed only the telephone numbers dialed *not the subsequent communications*. *Smith*, 442 U.S. at 741. Again, the Court *focused on the nature of the challenged materials* and determined that there was no reasonable expectation of privacy in the numbers a person dials because that person voluntarily conveys those numbers to the phone company as a means of establishing communication, and *do not represent the communication itself*. It is also important to note that the

Petitioner in the case had been identified as having committed a robbery and the pen register recorded calls placed to the victim of the robbery.

*State v. DeFusco* is also not applicable to the present case. In *DeFusco* the Connecticut Supreme Court dealt with the issue of privacy expectation in garbage, a far cry from prescriptions. In fact, *DeFusco* actually identifies medical information as something that Connecticut residents would wish to maintain as confidential, stating "We are sensitive to the reality that, in our complex society, some Connecticut residents may legally generate garbage that reveals highly personal information. Medical information or products . . . are among those items that we think it reasonable for Connecticut residents to wish to maintain as confidential." *DeFusco*, 224 Conn. 627, 639, 620 A.2d 746, 753 n.19 (1993). The ruling of the Connecticut Supreme Court in this case, then, is in clear disagreement with the precedent of that same court. In addition, the trial court found that the Petitioner, because of his status as a detective with the Hartford Police Department, would have a heightened expectation of privacy in his medical records because of the fact that he often worked in conjunction with federal authorities. *Russo*, 2000 WL 1228004 at *5.

In each of these cases there was some form of judicial proceeding against the person whose records or garbage were searched and there existed some minimal element of probable cause, reasonable suspicion, or legal process. Such conditions are clearly lacking in the instant case. Brown testified that he searched the Petitioner's records because he did not believe that the search would lead to anything and that his investigation would only serve to clear the Petitioner's name. Brown also testified that he did not have a warrant or subpoena of any kind. Purportedly, the information he received from Lt. Kenary pertained only to allegations regarding Dr. Buccheri. With regard to the Petitioner, Brown's search of the pharmacies constituted the quintessential fishing expedition.

Furthermore, the information searched and seized was a communication between the doctor, Petitioner, and

respective pharmacists concerning the medical treatment the Petitioner was receiving. A person's prescription history reveals personal information, including the ailment from which one is suffering and the dosage of the medication. The examples are too numerous to list. However, such examples favor a more conservative approach in determining if there exists a reasonable expectation of privacy in the information than that advocated by the State.

Admittedly, prescription records do serve a regulatory function under the regulatory scheme. However, one cannot ignore the dual function of prescriptions. While they do serve to insure accountability, they also serve as the medium of communication between the doctor and pharmacist to provide medication to the patient. All this takes place in the context of the patient's treatment and the doctor-patient relationship. The fact that prescriptions are the medium of communication between doctor, pharmacist and patient differentiates prescriptions from bank records, telephone numbers, and garbage. Furthermore, the very nature of the personal information revealed by prescription records counsel in favor of finding a reasonable expectation of privacy in those records. Recognizing this, the Ninth Circuit has specifically held that there is a reasonable expectation of privacy in one's prescription records. *Murphy*, 1999 WL 439468 at *2.

The Ninth Circuit Court of Appeals held that an individual could assert Fourth Amendment protections when his prescriptions were obtained through a warrantless search and seizure during a criminal investigation. *Id.*, 1999 WL 439468 *2. In *Murphy*, a former sheriff filed an action against members of the Washington Board of Pharmacy, the County, and the Chief Criminal Deputy for the Prosecutor's Office, alleging that the individual Petitioners and the County violated his constitutional rights by undertaking a warrantless criminal investigation of his prescription use and medical treatment. The Petitioners claimed qualified immunity, but the court held that they were not entitled to qualified immunity when their actions constituted a warrantless search targeting an individual's

prescription and medical records. *Id.*, 1999 WL 439468 at *2. The court rejected the Petitioner's argument that the plaintiff lacked standing. In doing so the court held that a person may assert his Fourth Amendment rights where there is a legitimate expectation of privacy attaching to the records obtained from a third party. *Id.*, 1999 WL 439468 at *2.

In the present case, the Petitioner was the victim of a warrantless criminal investigation that targeted his prescription records. The trial court also found that the records searched by Brown "pertain to and provide insight into an individual's health." *Russo*, 2000 WL 1228004 at *5. These determinations are supported by the evidence submitted and are legally and logically correct. The Connecticut Supreme Court even admitted that "the Petitioner has a constitutionally protected privacy interest" and that "a majority of federal Circuit Courts of Appeals have concluded that this constitutionally protected right to confidentiality extends to medical information or records." *Russo* at 446, 458, 790 A.2d at 1140, 1147. Therefore, the Supreme Court's holding that the Petitioner did not have a reasonable expectation of privacy in his prescription records under the Fourth Amendment should be reversed.

### 2. The Petitioner's Reasonable Expectation of Privacy in His Confidential Medical Records is One Which Society is Willing to Accept as Reasonable.

The existence of a regulatory scheme is informative on the issue of whether there is a legitimate expectation of privacy which society is willing to accept as reasonable. In the context of regulated industries, the federal courts have looked to determine if the regulatory scheme provides for warrantless inspections as a means of determining legislative intent. *See New York v. Burger*, 482 U.S. 691, 703 (1987); *United States v. Enserro*, 401 F.Supp. 460 (W.D.N.Y. 1975); *United States v. Pugh*, 417 F.Supp 1019, 1023 (W.D. Mich. 1976).

This Court has held that statutes governing the regulation of industry must provide a constitutionally adequate substitute for a warrant. *Burger*, 482 U.S. at 703. In *Enserro*, the court held that federal regulations concerning controlled substances, pharmacies in particular, do not allow warrantless searches. *Enserro*, 401 F.Supp. at 463. Looking at the issue of warrantless searches in the context of highly regulated industries, the court made an in-depth analysis of the differences between the Controlled Substances Act ("the Act"), 21 U.S.C. 880 *et seq.*[8] and the Gun Control Act of 1968, 18 U.S.C. § 923(g), which specifically authorizes the Secretary of the Treasury to enter and inspect firearms records without a warrant. The court stated:

> The important point is that Congress, in the Gun Control Act of 1968, had made the determination that it was in the public interest to give the Secretary of the Treasury the authority to enter and inspect premises without the necessity of a warrant. Congress chose not to follow that procedure under 21 U.S.C. § 880. Instead, Congress laid out an elaborate scheme of applying for a warrant before a search may be conducted . . . A warrant remains the necessary standard procedure, since there is no statute defining specific standards for warrantless inspections . . . .

*Enserro*, 401 F.Supp. at 463; *State v. Doyle*, 1990 WL 265227 at *5 (Conn. Super. Ct. 1990) ("[d]espite the fact that the pharmaceutical field is a highly regulated industry, Congress has not authorized warrantless searches of pharmacies.")

In this case, Brown was governed by federal regulations regarding controlled substances. *Doyle*, 1990 WL 265227 at *4-5. The Act and the Code of Federal Regulations ("the

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[8] Federal regulation of controlled substances is governed by 21 U.S.C. § 800 *et seq.* 21 U.S.C. § 880 specifically provides for the execution of administrative inspections and warrants of controlled premises which include pharmacies. App. 70-74.

Code")[9] have the combined effect of spelling out in detail the means by which DEA officials can gain access to pharmacy records.[10] *Doyle*, 1990 WL 265227 at *4-5.

The Connecticut Supreme Court argues that the Petitioner does not have a legitimate expectation of privacy in his medical records because of this regulatory scheme. *Russo* at 466, 790 A.2d at 1150. The purported reason is that the regulatory scheme represents society's willingness to accept government inspection of pharmacy records. *Id.* The court stated that the fact that Connecticut statute "expressly authorizes law enforcement officials to obtain records of prescriptions for controlled substances without a warrant reflects a considered public policy judgment that,

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[9] 21 C.F.R. § 1300 to 1316 govern the actions of the DEA with regard to pharmacies.

[10] Specifically, 21 U.S.C. § 880 provides for the execution of administrative inspections and warrants of controlled premises, which include pharmacies. App. 70-74.

21 C.F.R. § 1316.13 provides that pharmaceutical inspections are to be con-ducted once a year. App. 83. The process for conducting an inspection is as follows: (1) Upon entry the inspector will (a) state his purpose, (b) present to the owner or agent in charge appropriate credentials and written notice of his inspection authority under 1316.06 and (3) receive informed consent under 1316.08, or use an administrative warrant issued under 1316.09-1316.13. 21 C.F.R. § 1316.05. App. 78. It is interesting to note the strict requirements of §§ 1316.06 and 1316.08. App. 78, 80-81.

Pursuant to § 1316.06, the notice of inspection shall contain the name of the owner or agent in charge of the controlled premises; the name and address of the controlled premises; the date and time for the inspection; a statement that a notice of inspection is given pursuant to section 510 of the Act (21 U.S.C. § 880); a reproduction of the pertinent parts of section 510 of the Act; and the signature of the inspector. App. 78.

§ 1316.08 governing written consent requires: (1) the owner has been informed of his right not to have an administrative inspection made without an administrative inspection warrant; (2) he has the right to refuse consent; (3) that anything seized may be used against him in a criminal prosecution; (4) that he has been presented with a notice of inspection as set forth in § 1316.06; (5) that consent is given voluntarily; and (6) that he may withdraw consent. App. 80-81.

in and of itself, serves to diminish a person's expectation of privacy in such records."[11] *Russo* at 466, 790 A.2d at 1152.

The Connecticut Supreme Court argues that, despite its acceptance of the trial court's finding that Brown's investigation was from its inception a criminal investigation of the Petitioner, that the regulatory scheme allows for warrantless searches if the official gains the consent of the pharmacist. However, it is disingenuous for the Court to argue that the existence of a regulatory scheme negates or reduces any expectation of privacy in one's medical records while simultaneously arguing that restrictions imposed on state agents by the same regulatory schemes do not apply in a criminal investigation simply because that regulatory scheme adequately protects the privacy interests that do exist. *Russo* at 472, 790 A.2d at 1155.

Regardless of any statutory provision that may allow for searches of medical records without a warrant, the practice of using administrative regulations to surreptitiously conduct a criminal investigation has received hostile treatment from the courts. The courts have resoundingly held that using administrative regulations in a criminal investigation, in order to circumvent probable cause requirements, is unacceptable. *Enserro*, 401 F.Supp 460, 463 (holding that a warrantless search of a pharmacy pursuant to receipt of information *alleging criminal activity*, was illegal and ordering all evidence gathered, and all derivative evidence, be suppressed); *United States v. Lawson*, 502 F.Supp. 158, 165 (D. Maryland 1980) (holding that "once the purpose behind the search shifts from administrative compliance to a quest for evidence to be used in a criminal prosecution, the government may constitutionally enter the premises only upon securing a warrant supported by full probable cause."); *Doyle*, 1990 WL 265227 at *3 (holding that "[w]hen the 'inspection' in question is not undertaken as a *routine regulatory inspection*, but rather a search undertaken because government

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[11] The Connecticut Supreme Court is referring her to C.G.S. § 21a-265. See App. 95 for the full text of the statute.

officials have 'cause to believe' they will find evidence of a crime, a search warrant is required.") (emphasis added).

If Brown were conducting an inspection pursuant to a statutory grant of authority, his actions fell far short of the necessary requirements under the regulations. Brown failed to act in accordance with statutory authority. Instead, Brown testified that he was conducting pharmacy "surveys," not an administrative inspection, even though there is no code or regulation that would have authorized him to "survey" area pharmacies just to "see if there was anything on" the Petitioner. Thus, the contention of the Court that Brown did gain consent of the pharmacists pursuant to both state and federal law cannot be true, for the pharmacists were consenting to an action which Brown had no authority to take. Brown's actions attempt to walk the line between a legitimate inspection of the pharmacy records and what he terms a "survey," an activity that is not mentioned in the Act or Code.

The State and the Connecticut Supreme Court also maintain that the plain language of the relevant state statutes grant open access to the pharmacy records, while simultaneously arguing that Brown received the requisite consent necessary to search the pharmacies. *Russo*, 459 at 448-449, 790 A.2d at 1141-42. Accepting the first element of this argument negates the need for consent. The State and Brown are desperately trying to legitimize Brown's actions because there is no authority permitting him to do warrantless "surveys". It requires a stretch of the imagination to accept the result of the court's holding, which would make it possible for agents of the state to access an individual's pharmacy records even when there is no reasonable basis to believe that there has been any misconduct on the part of that individual. If the court's argument was coherent, there would be no logical reason for the inclusion of regulations specifically governing access to pharmacy records by federal agents or for any statutory protection of these records.

The trial court recognized that this argument cannot withstand scrutiny. In making this observation the trial

court found *Doyle* helpful. In *Doyle* the court analyzed both the legislative parameters set for DEA investigators as well as the use of regulatory inspections to gather evidence in a criminal investigation. Both counseled against accepting the actions of the DEA investigator, and they are informative for purposes of the present situation.

In *Doyle*, during a *routine* administrative inspection of a pharmacy, a state agent came across discrepancies that led her to believe that certain prescriptions were illegitimate. The state agent proceeded to contact the DEA. The state agent and a DEA agent then obtained a Notice of Inspection of Controlled Premises, as required by 21 U.S.C. § 880(b)(2), and conducted a thorough audit of the pharmacy. However, Judge Pickett determined that the actions of the DEA agent were governed by 21 U.S.C. § 880; and accordingly, because he failed to obtain an administrative search warrant, he had no authority to conduct the initial search. Due to the failure to follow appropriate administrative regulations in the initial search, and because the subsequent search was conducted pursuant to a criminal investigation, a warrant supported by full probable cause was required. *Doyle*, 1990 WL 265227 at *2-5.

While the trial court held that the situation in the present case was *more* egregious than that in *Doyle*, *Doyle* is also a clear recognition by a Connecticut court that use of administrative procedures to circumvent the probable cause requirements of a criminal search and seizure is not permitted. Furthermore, while the State argued that Connecticut General Statutes §§ 21a-274(a) and (b) provide for cooperation in the enforcement of state laws, those statutes apply to situations in which criminal activity is discovered during a legitimate inspection of records, *not the use of the inspection process to further a criminal investigation that has already begun*. The trial court clearly states that the Connecticut statutes and 21 U.S.C. § 880 authorize administrative searches only. *Russo*, 2000 WL 1228004 at *5. The distinction is important, for when criminal activity is detected through the legitimate enforcement of the state or federal regulatory scheme, there must be cooperation between law enforcement and the

regulatory agencies to pursue criminal sanctions. These statutes concerning interagency cooperation in criminal investigations represent a "one-way street." When criminal activity is found during a *legitimate* inspection, cooperation is allowed; but when criminal activity is being investigated, the state may not use the lesser burdens of administrative regulations to circumvent the constitutional rights of the suspect individual. This is not a novel concept and, as discussed above, is recognized by both federal and state courts. *Enserro*, 401 F.Supp 460, 463 (finding that a warrantless search of a pharmacy pursuant to receipt of information alleging criminal activity was illegal, and all evidence gathered and all derivative evidence be suppressed); *Lawson*, 502 F.Supp. 158, 165 (D. Maryland 1980) (holding that use of an administrative search warrant to obtain criminal evidence from a pharmacy was illegal, and ordering the evidence suppressed); *Doyle*, 1990 WL 265227 at *2-5 (citing *People v. Hedges*, 112 Misc.2d 632, 447 N.Y.S.2d 1007, 1012 (1984)); *Cf. Pugh*, 417 F.Supp. 1019 (W.D. Mich. 1976) (holding that the provisions of the Act establishing an exception to the warrant requirement "in any other situation where a warrant is not constitutionally required" did not validate a search of a pharmacy); *Commonwealth v. Frodyma*, 386 Mass. 434, 436 N.E.2d 925 (1982) (finding that an administrative search warrant was invalid not only because it lacked specificity, but also because the application failed to establish administrative probable cause to seize pharmacy records); *Lipomi*, 385 Mass. 370, 432 N.E.2d 86 (1982) (finding that administrative search warrant, pursuant to which inspection of pharmacy was conducted, was invalid because it failed to specify the purpose of, or property subject to, the inspection).

In addition to the court's misinterpretation of the state regulatory scheme, the Connecticut Supreme Court virtually ignored the applicable federal regulations in focusing almost exclusively on the state regulations governing controlled substances as the foundation for their argument that the Petitioner does not have the requisite expectation of privacy in his medical records to challenge

the searches and seizures of those records. *Russo* at 466, 790 A.2d 1151. As Brown is a federal official, this reliance is misplaced. *See infra* discussion Part I(B)(2). Even if this were not the case, the plain language of the statutes cited do not support the proposition proffered by the court. For instance, the court interprets C.G.S. § 21a-265 to mean that "[I]t would have been illogical for the legislature to require state and federal law enforcement officials to obtain a search warrant for prescription records under § 21a-265 . . . and, at the same time, broadly authorize the dissemination of those records under § 21a-626(b)(6) to *any* person or state or federal agency seeking discovery of such information pursuant to a subpoena." *Russo* at 453, 790 A.2d at 1144. § 21a-265, however, states quite explicitly that prescription records are accessible for "inspection purposes," not for purposes of a criminal search and seizure.[12] In support of this argument the Court need only look at C.G.S. § 21a-261(d), entitled "Inspection of records, Entry on premise. Warrants and arrests." This section is devoted to the authorization of agents to obtain search warrants in the case of a felony, *if they have probable cause*.[13] The legislature's inclusion of this section should remove any doubt that they *did not* intend for the type of random and groundless searches of an individual's pharmacy records such as we have in the present case. As the dissent explained, "§ 21a-265 . . . is intended to be a shield for pharmacy owners and operators, and other persons with privacy interests in pharmacy records, not a sword for government officials seeking access to those records." *Russo* at 474, 790 A.2d at 1156. The dissent reasoned that the statutes that do afford officials the affirmative authority to inspect pharmacy records are § 21a-261 and its federal counterpart, 21 U.S.C. § 880, do not "authorize a warrantless search of pharmacy records for criminal law enforcement purposes". *Id.*

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[12] C.G.S. § 21a-265. App. 95.

[13] C.G.S. § 21a-261. App. 93.

The Petitioner recognizes that a privacy interest may be attenuated pursuant to a regulatory scheme. *United States v. Chuang*, 897 F.2d 646, 650 (2d Cir. 1990). Brown, however, acted well outside the scope of the regulatory scheme. *See infra* discussion Part I(B)(2) at 16. His actions were an abuse of the regulatory scheme, an abuse aimed solely at producing incriminating evidence against the Petitioner. The Petitioner does not need to challenge the proper execution of this regulatory scheme, for it is well established that states possess the authority to construct statutory schemes designed to further public interests such as health and safety. *See Whalen,* 429 U.S. 589 at 598 (finding that a New York statutory scheme requiring physicians to forward prescription records for certain controlled substances to a centralized database maintained by the department of health was permitted pursuant to the state's authority to minimize the use of harmful drugs).

The court completely fails to address the limits imposed on criminal searches *and* seizures in contrast to searches conducted in the interest of public health and safety. *See infra* discussion Part I(B)(2) at 15-19. The court then mistakes the regulatory scheme as compelling the conclusion that there is no reasonable expectation of privacy in an individual's prescription records. *Russo* at 466, 790 A.2d at 1152. Yet, as the dissent points out, this argument falters in light of the court's failure to adequately distinguish the so-called "special needs" cases. As the dissent explains, "In the special needs cases, the question is whether a warrantless and suspicionless search is nevertheless reasonable under the Fourth Amendment because of 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'". *Id.* at 477, 790 A.2d at 1158. In each case where such searches were upheld as constitutional, it is imperative to note that the actual purpose of the search was *not* for law enforcement purposes or judged to be a pretext for law enforcement purposes. The regulatory schemes in the special needs cases were constructed for the distinct purposes of maintaining public health and

safety. In other words, this Court has concluded that the purpose of the search is the relevant inquiry and constitutionally significant. *Russo* at 478, 790 A.2d at 1159. "[I]n special needs cases, we have tolerated suspension of the Fourth Amendment's warrant or probable cause requirement in part because *there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement.*" *Id.* (quoting *Ferguson v. Charleston*, 532 U.S. 67, n.15 (2001) (emphasis added)). *See generally Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989) (drug testing of railroad employees was not a violation of the Fourth Amendment because goal of the program was not to assist in the prosecution of the employees but to prevent railroad accidents and deaths); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (drug testing of student athletes did not violate Fourth Amendment where the purpose of the testing was to protect high school athletes from the negative effects of drug use); *Nat'l Treas. Employees Union v. Von Raab*, 489 U.S. 656 (1989) (program requiring drug testing of United States Customs employees applying for certain positions did not violate the Fourth Amendment where the purpose of the testing was to ensure the physical health and integrity of customs agents); *Ferguson*, 532 U.S. 67 (recognizing that the special needs balancing test is inapplicable to cases where the search is intended for general law enforcement purposes).

Here also lies the majority's misplaced reliance on *Whalen*. Contrary to the court's conclusion that *Whalen* is "indistinguishable", *Whalen* involved a similar statutory scheme in a public health context, not a criminal investigation. The Court in *Whalen* declined to extend privacy rights under the Fourth Amendment to situations in which "narrowly focused intrusions into individual privacy during the course of a criminal investigation" was not present. *Whalen* at 604. In addition, the Court explicitly confined its ruling to the specific facts of the case at bar. "We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data . . . We simply hold that *this*

record does not establish an invasion of any right or liberty protected by the Fourth Amendment." *Id.* at 605 (emphasis added). In light of the protections afforded to the targets of criminal investigations under the Fourth Amendment when the individual would have a reasonable privacy expectation in the object of the search, *Whalen* was clearly misapplied by the court. *See generally Rakas*, 439 U.S. at 136 (the individual must establish that there is a reasonable expectation in the privacy of the object of the search); *Salvucci*, 448 U.S. 83 (an individual may assert Fourth Amendment protection if a reasonable expectation of privacy exists in the third party premises); *Skinner*, 489 U.S. 602; *Vernonia Sch. Dist. 47J*, 515 U.S. 646; *Nat'l Treas. Employees Union*, 489 U.S. 656; *Ferguson*, 532 U.S. 67.

In this case the criminal investigation was the impetus for the search of the Petitioner's pharmacy records, and it is precisely the abuse of regulatory schemes rejected by the courts. For these reasons, the decision of the Connecticut Supreme Court should be reversed.

### C. The Statutory Scheme Regulating Controlled Substances Provide A Legal Framework Which Limits Access To Prescription Records To Insure The Confidentiality Of Those Records.

The court's argument that there is no expectation of privacy in one's prescription records and medical information because of the existence of a detailed regulatory scheme governing such information, is negated by the court's own acknowledgment that this was a criminal investigation and was not an administrative or regulatory procedure. *Russo* at 445-446, 790 A.2d at 1140. It is reasonable that *within the context of a regulatory scheme* and *in the proper execution of that scheme* there is a reduced expectation of privacy. However, this statutory framework does not allow for the warrantless inspection of pharmacy

records, for, as the court concedes, the scheme simultaneously strives to insure a recognizable expectation of privacy in those records. *Id.* at 464, 790 A.2d at 1150-51.

The court presents an absurd logic. The court reasons that because there is a regulatory scheme, no reasonable expectation of privacy exists; but because this was a criminal investigation, not an administrative inspection, the regulations governing access to pharmacy records do not apply. Such a conclusion is in direct contradiction to the special needs cases cited above. *See* discussion, *supra,* Part (B)(2). The trial court saw through this twisted logic and held that the Petitioner had a reasonable expectation of privacy in his confidential medical records. Accordingly, this Court should reverse the Connecticut Supreme Court's ruling.

## II. THE TRIAL COURT CORRECTLY HELD THAT THE STATE FAILED TO PROVE THAT BROWN RECEIVED PROPER CONSENT BEFORE HE SEARCHED THE PETITIONER'S CONFIDENTIAL MEDICAL RECORDS.

### A. Standard of Review

Findings of fact will not be reversed unless "clearly erroneous in view of the evidence and pleadings in the whole record" and conclusions of law will not be reversed if they are "legally and logically correct and [if] they find support in the facts set out in the memorandum of decision . . . " *Blackman*, 246 Conn. at 553, 716 A.2d at 105 *quoting State v. Colvin*, 241 Conn. at 656, 697 A.2d at 1122. However, whether there was valid consent to search is a factual question that will not be lightly overturned on appeal. *United States v. Sanchez-Jaramillo*, 637 F.2d 1094, 1098 (7th Cir.), *cert. denied*, 449 U.S. 862 (1980). The State has the burden to establish the voluntariness of the consent, and the trial court's finding "will not be upset . . . unless clearly erroneous." *State v. Reddick*, 189 Conn. 461, 469, 456 A.2d 1191, 1195 (1983). In determining if the State has sustained its burden of establishing consent, no

one factor is controlling. *Id.*, 189 Conn. at 469, 456 A.2d at 1195. It is for the trial court to decide the issue based on the evidence it deems credible along with reasonable inferences to be drawn from that evidence. *Id.*

The standard of review is similar in federal court. "'[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.'" *Sanchez-Jaramillo*, 637 A.2d at 1098 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1986)). "The issue of whether a consent to search is indeed voluntary 'is a question of fact to be determined from the totality of all the circumstances'." *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). The Court will not reverse the district court's finding that consent was voluntarily given unless the decision was "clearly erroneous." *Id.* (quoting *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976)).

### B. The State Failed To Carry Its Burden Of Establishing Consent.

The trial court held as a finding of fact that the State failed to prove consent on the part of the Petitioner. R. 69. In so holding, the trial court held that the Petitioner was the only individual who could have given consent given the circumstances. R. 70. This finding is supported by the absence of any testimony to the contrary. The only testimony that the State presented regarding the issue of consent was that of Brown. His testimony was simply that he asked for the Petitioner's pharmacy records and that the pharmacists gave consent. R. 69. There was no signed waiver, no testimony from the pharmacists, or any corroborative evidence presented that would support the testimony of Brown. R. 69. In fact, Brown did not even have the statutory authority to request consent because he had no authority to be there. *See, infra* discussion Part (B)(1).

In considering if this evidence met the prerequisites of 21 U.S.C. § 880 *et seq.*, the trial court found that the State

failed to prove that there was any informed consent received from the pharmacists, and that the State failed to prove that the pharmacist in each case had any authority pursuant to his status within the pharmacy to consent. R. 69. This reasoning is fully supported by the fact that Brown did not present written notice of his inspection authority and that he did not receive written consent from the pharmacists pursuant to 21 C.F.R. § 1316.06 and 1316.08. *Russo*, 2000 WL 1228004 at *1 (stating that Brown did not have a search warrant, administrative warrant or subpoena or any form of legal process).

Regardless, the State argues that the trial court applied the wrong standard, and that "a search is not unreasonable under the Fourth Amendment if consented to by someone with common authority over the premises . . . or by someone whom the police reasonably believe has common authority over the premises." State's Brief at 20-21. The State also argues that Brown had authority beyond 21 U.S.C. § 880 on the basis of a liberal reading of 21 U.S.C. § 873(a). *Id.* at 21. However, there is no foundation for the liberal reading that the State proffers, especially when 21 U.S.C. § 880 *et seq.* and 21 C.F.R. 1316 *et seq.* are read in conjunction.

The combined effect of the Code and Act is to specifically prescribe Brown's authority. Nowhere do these statutes and regulations authorize, or even condone, the pursuit of a criminal investigation outside the scope of the regulatory scheme. The statutes referred to by the State cannot be used to justify the manipulation of administrative procedures to circumvent proper criminal procedure and to improperly gather evidence in furtherance of a criminal investigation. The testimony of Brown was unequivocal. This was a criminal investigation, and as such, the regulations described above did not apply. Yet Brown was at a loss to define where he derived the authority to search the pharmacies as he did. Therefore, Brown had no authority to even request access to the records and any consent would be moot.

Even if the trial court had applied the wrong standard, the State's argument that a search is not unreasonable if consented to by someone with authority over the premises is unsupported by the evidence. As the trial court pointed out, the State completely failed to establish that the pharmacists who were approached by Brown had any authority to permit Brown to have access to the Petitioner's records. While Brown testified that as an employee with the Drug Enforcement Administration he was familiar with the statutes governing the regulation of controlled substances, he never testified that the pharmacists had authority, or that he reasonably believed they had authority, to grant him access to the Petitioner's records given the circumstances. He did, however, testify that his agency could initiate revocation of the pharmacies' licenses, a fact that suggests an element of underlying coercion in any alleged consent that was given.

Significantly, the Connecticut Supreme Court does not address the issue of consent, but reasons only that the search was constitutionally permissible due to the state's interest in regulating and policing the distribution of controlled substances and to the existence of the regulatory scheme and therefore a reasonable person's diminished privacy interests in his or her medical records due to these latter two factors. However, the evidence was evaluated by the trial court when it made its determination that there was no consent for the search of the Petitioner's medical records. The judgment of the trial court should therefore be affirmed and the decision of the Connecticut Supreme Court reversed.

## CONCLUSION

This case is a clear example of the State using a regulatory scheme to circumvent the constitutional rights of one of its citizens to collect incriminating evidence in a criminal investigation. While the courts have not condoned this practice in situations where there was an element of probable cause or reasonable suspicion, it is beyond comprehension that a court would condone this conduct

where the state agent, without expecting to find anything, searches a specific individual's prescription records simply to "see if there is anything on" an individual. Brown conducted warrantless searches of the Petitioner's prescription records pursuant to a criminal investigation. Brown also failed to obtain the statutorily prescribed consent prior to searching the Petitioner's records, abusing his authority and the Petitioner's constitutional rights under the Fourth Amendment to the United States Constitution.

## STATEMENT OF RELIEF REQUESTED

For the above reasons, the Connecticut Supreme Court's decision to reverse the trial court's granting of the Petitioner's motion to suppress was legally and logically incorrect. The Petitioner asks that this Court reverse the decision of the Connecticut Supreme Court.

THE PETITIONER,
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790 A.2d 1132

IN THE

# SUPREME COURT

OF THE

# STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* NICHOLAS RUSSO
(SC 16430)

(Filed Feb. 19, 2002)

Sullivan, C. J., and Katz, Palmer,
Vertefcuille and Zarella, Js.

PALMER, J.

The state, with the permission of the trial court, appeals from the judgment of that court dismissing an information charging the defendant, Nicholas Russo, with multiple counts each of the crimes of forgery in the second degree in violation of General Statutes § 53a-139 (a)(4),[1] and obtaining a controlled substance[2] by forging a

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[1] General Statutes § 53a-139(a) provides in relevant part: "A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument or issues or possesses any written instrument which he knows to be forged, which is or purports to be, or which is calculated to become or represent if completed . . . (4) a prescription of a duly licensed physician or other person authorized to issue the same for any drug or any instrument or device used in the taking or administering of drugs for which a prescription is required by law."
General Statutes § 53a-139 (b) defines the term "drugs" for purposes of subsection (a) as "all drugs except controlled drugs as defined in [General Statutes § ] 21a-240."

[2] General Statutes § 21a-240 (9) defines "controlled substance" as "a drug, substance, or immediate precursor in schedules I to V, inclusive, of the Connecticut controlled substance scheduling regulations adopted pursuant to [General Statutes § ] 21a-243. . . . "

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prescription in violation of General Statutes § 21a-266 (a)(2).[3] The state claims that the trial court improperly granted the defendant's motion to suppress certain records of the defendant's prescriptions that the state had obtained from several pharmacies without a search warrant and without the defendant's consent. We agree with the state that the trial court improperly granted the defendant's motion to suppress the defendant's prescription records and, accordingly, reverse the judgment of the trial court.

The record reveals the following relevant facts and procedural history. The state filed an information charging the defendant with thirty-two counts of obtaining Tylenol with codeine No. 3 (Tylenol 3), a controlled substance,[4] by forging a prescription in violation of § 21a-266 (a)(2), and thirty-two counts of forgery in the second degree in violation of § 53a-139 (a)(4).[5] The defendant moved to suppress

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General Statutes § 21a-243 (c) provides in relevant part: "The Commissioner of Consumer Protection . . . may by regulation designate . . . as a controlled substance, a substance or chemical composition containing any quantity of a substance which has been found to have a stimulant, depressant or hallucinogenic effect upon the higher functions of the central nervous system and having a tendency to promote abuse or physiological or psychological dependence or both. . . ."

[3] General Statutes § 21a-266 (a) provides in relevant part: "No person shall obtain or attempt to obtain a controlled substance or procure or attempt to procure the administration of a controlled substance . . . (2) by the forgery or alteration of a prescription. . . ."

[4] Tylenol 3 is a schedule III controlled substance. E.g., Physicians' Desk Reference (55th Ed.2001) p. 2397; *see* Regs., Conn. State Agencies § 21a-243-9.

[5] The thirty-two counts of second degree forgery mirror the thirty-two counts of obtaining a controlled substance by forging a prescription. The information alleges that the defendant unlawfully obtained Tylenol 3 on various dates between October 10, 1996, and September 1, 1997.

certain records of his prescriptions that the state had obtained from several pharmacies without a warrant and without the defendant's prior consent. The defendant's motion to suppress was predicated on his contention that he has a reasonable expectation of privacy in his prescription records and, therefore, that the state had obtained those records in violation of his rights under the fourth amendment to the United States constitution,[6] made applicable to the states through the due process clause of

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[6] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The defendant also sought suppression of his prescription records under article first, § 7, of the Connecticut constitution. The trial court, however, did not indicate whether its decision granting the defendant's motion to suppress was based on the federal constitution, the state constitution or both. On appeal, the defendant renews his claim under both the fourth amendment and article first, § 7. The defendant has failed, however, to articulate any reason why he is entitled to any greater rights under the state constitution than he is under the federal constitution. Accordingly, we limit our review to the defendant's claim under the federal constitution. *See*, e.g., *State v. Garcia*, 233 Conn. 44, 66 n. 15, 658 A.2d 947 (1995).

We note that the brief submitted by the amici curiae does contain an independent state constitutional analysis of the issue presented by this appeal. That brief, however, was not filed until after the parties' briefs already had been filed with this court. The brief, therefore, is tantamount to a reply brief. We ordinarily do not address claims raised for the first time in a reply brief; *see*, e.g., *Bovat v. Waterbury*, 258 Conn. 574, 585 n. 11, 783 A.2d 1001 (2001) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" [internal quotation marks omitted] ); *Ramos v. Vernon*, 254 Conn. 799, 843-44, 761 A.2d 705 (2000) (same); and we see no reason to deviate from this policy in regard to the brief filed by the amici curiae in this case.

the fourteenth amendment to the United States constitution. *See Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The trial court conducted a preliminary hearing on the defendant's motion to suppress, limited to the issue of whether the defendant had standing to seek the suppression of prescription records in the possession of a pharmacy. After that hearing, the court issued a written decision in which it concluded that the defendant had a constitutionally protected privacy interest in those records and, consequently, that he had standing to challenge the state's use of such records in its case-in-chief.[7]

Thereafter, the trial court held an evidentiary hearing on the defendant's motion to suppress. At the conclusion of the hearing, the trial court made the following factual findings.[8] At all times relevant to this case, the defendant was a detective with the Hartford police department. The defendant's supervisor, Lieutenant David Kenary, was the commander of the Hartford police department's crimes against persons and property unit. Marcus Brown was a

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[7] "To receive fourth amendment protection against unreasonable searches and seizures, a defendant must have a legitimate expectation of privacy in the [subject of the search]. . . . Absent such an expectation, the subsequent police action has no constitutional ramifications. . . . The determination of whether the defendant had a reasonable expectation of privacy in the [subject of the search] requires a two part factual inquiry: first, whether the defendant has exhibited an actual subjective expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable." (Citations omitted; internal quotation marks omitted.) *State v. Rodriguez,* 223 Conn. 127, 132, 613 A.2d 211 (1992). The trial court found that the defendant had satisfied this two-prong test.

[8] The trial court did not file written findings but, rather, issued its findings from the bench.

diversion investigator with the federal Drug Enforcement Administration, assigned to conduct regulatory inspections of pharmacies.

On or about September 9, 1997, Kenary called Brown to arrange a meeting at the Hartford police department. The purported purpose of the meeting was to exchange information about Santo Buccheri, a Hartford physician, and his issuance of prescriptions for controlled substances. At the meeting, Kenary informed Brown that he believed that Buccheri was overprescribing controlled substances and dispensing samples to his patients without maintaining proper records. Kenary asked Brown to notify him if the defendant's name surfaced during any investigation of Buccheri and provided Brown with the defendant's date of birth and home address.

Beginning on October 31, 1997, Brown went to pharmacies located in the vicinity of both Buccheri's office and the defendant's home and, without a search warrant, asked each of the pharmacies to provide him with the defendant's prescription records.[9] The records contained information about prescriptions that each pharmacy had filled for the defendant, including the name of the prescribing physician, the date on which the defendant had submitted the prescription to the pharmacy, the type and quantity of drug prescribed and the price of the drug.[10] The pharmacies complied with Brown's requests.[11] Brown later

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[9] Brown testified that he had requested the defendant's prescription records from five different pharmacies.

[10] The prescription records contain the same information that is found on the actual prescription forms.

[11] According to Brown, each of the pharmacists who had provided him with those records was "'fully cooperative.'"

returned to each pharmacy and, again by request, obtained copies of the actual prescription forms that the defendant had presented to the pharmacies.[12]

The trial court noted that, although Brown's testimony suggested that his purpose in obtaining the defendant's pharmacy records was to rule out the defendant as a target of the investigation, other evidence presented at the hearing indicated that the defendant was the focus of the investigation. Specifically, the trial court alluded to a report prepared by Brown on November 19, 1997, that identified the defendant as the target of Brown's investigation. The court also noted that, prior to preparing that report, Brown had not requested *records of Buccheri's prescribing practices* but, instead, had requested only *the defendant's prescription records.*

The trial court found that the purpose of Brown's investigation was to determine whether the defendant had been abusing controlled substances, and that Buccheri was under investigation only because he was the defendant's physician. Accordingly, the trial court determined that Brown was not conducting an administrative inspection of the pharmacy pursuant to 21 U.S.C. § 880[13] when he

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[12] Brown indicated that he sought and received copies of the original prescription forms because the defendant's prescription records indicated that he had obtained an excessive amount of Tylenol 3, specifically, between 7000 and 8000 tablets.

[13] Title 21 of the United States Code, § 880, provides: "Administrative inspections and warrants

"(a) 'Controlled premises' defined

"As used in this section, the term 'controlled premises' means –

"(1) places where original or other records or documents required under this subchapter are kept or required to be kept, and

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"(2) places, including factories, warehouses, and other establishments, and conveyances, where persons registered under section 823 of this title (or exempt from registration under section 822(d) of this title or by regulation of the Attorney General) or regulated persons may lawfully hold, manufacture, distribute, dispense, administer, or otherwise dispose of controlled substances or listed chemicals or where records relating to those activities are maintained.

"(b) Grant of authority; scope of inspections

"(1) For the purpose of inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept or made under this subchapter and otherwise facilitating the carrying out of his functions under this subchapter, the Attorney General is authorized, in accordance with this section, to enter controlled premises and to conduct administrative inspections thereof, and of the things specified in this section, relevant to those functions.

"(2) Such entries and inspections shall be carried out through officers or employees (hereinafter referred to as 'inspectors') designated by the Attorney General. Any such inspector, upon stating his purpose and presenting to the owner, operator, or agent in charge of such premises (A) appropriate credentials and (B) a written notice of his inspection authority (which notice in the case of an inspection requiring, or in fact supported by, an administrative inspection warrant shall consist of such warrant), shall have the right to enter such premises and conduct such inspection at reasonable times.

"(3) Except as may otherwise be indicated in an applicable inspection warrant, the inspector shall have the right –

"(A) to inspect and copy records, reports, and other documents required to be kept or made under this subchapter;

"(B) to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished drugs, listed chemicals, and other substances or materials, containers, and labeling found therein, and, except as provided in paragraph (4) of this subsection, all other things therein (including records, files, papers, processes, controls, and facilities) appropriate for verification of the records, reports, and documents referred to in clause (A) or otherwise bearing on the provisions of this subchapter; and

"(C) to inventory any stock of any controlled substance or listed chemical therein and obtain samples of any such substance or chemical.

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"(4) Except when the owner, operator, or agent in charge of the controlled premises so consents in writing, no inspection authorized by this section shall extend to –

"(A) financial data;

"(B) sales data other than shipment data; or "(C) pricing data.

"(c) Situations not requiring warrants

"A warrant under this section shall not be required for the inspection of books and records pursuant to an administrative subpoena issued in accordance with section 876 of this title, nor for entries and administrative inspections (including seizures of property) –

"(1) with the consent of the owner, operator, or agent in charge of the controlled premises;

"(2) in situations presenting imminent danger to health or safety;

"(3) in situations involving inspection of conveyances where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

"(4) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

"(5) in any other situations where a warrant is not constitutionally required.

"(d) Administrative inspection warrants; issuance; execution; probable cause

"Issuance and execution of administrative inspection warrants shall be as follows:

"(1) Any judge of the United States or of a State court of record, or any United States magistrate judge, may, within his territorial jurisdiction, and upon proper oath or affirmation showing probable cause, issue warrants for the purpose of conducting administrative inspections authorized by this subchapter or regulations thereunder, and seizures of property appropriate to such inspections. For the purposes of this section, the term 'probable cause' means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant.

"(2) A warrant shall issue only upon an affidavit of an officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate judge and establishing the grounds for issuing the warrant. If the judge or magistrate judge is satisfied that grounds for

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obtained the defendant's prescription records but, rather, was acting in pursuance of a criminal investigation of the

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the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of such inspection, and, where appropriate, the type or property to be inspected, if any. The warrant shall identify the items or types of property to be seized, if any. The warrant shall be directed to a person authorized under subsection (b)(2) of this section to execute it. The warrant shall state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof. It shall command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified, and, where appropriate, shall direct the seizure of the property specified. The warrant shall direct that it be served during normal business hours. It shall designate the judge or magistrate judge to whom it shall be returned.

"(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate judge allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate judge, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and the applicant for the warrant.

"(4) The judge or magistrate judge who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made." 21 U.S.C. § 880 (1994).

defendant in cooperation with the Hartford police department.

The trial court further concluded that, inasmuch as Brown's conduct in obtaining the defendant's prescription records constituted a search in the course of a criminal investigation, Brown was required to obtain either a search warrant or the defendant's prior consent. Because Brown had obtained neither, the court granted the defendant's motion to suppress.

Thereafter, the trial court granted the state's motion to dismiss the information for lack of sufficient evidence.

The trial court also granted the state's motion for permission to appeal. *See* General Statutes § 54-96.[14] This appeal followed.[15]

On appeal, the state does not challenge the trial court's findings of fact.[16] Rather, the state contests the legal conclusions rendered by the trial court on the basis of those factual findings. In particular, the state claims that

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[14] General Statutes § 54-96 provides: "Appeals from the rulings and decisions of the Superior Court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the Supreme Court or to the Appellate Court, in the same manner and to the same effect as if made by the accused."

[15] The state appealed to the Appellate Court, and we granted the defendant's motion to transfer the appeal to this court pursuant to General Statutes § 51-199 and Practice Book § 65-2.

[16] The state does contend, however, that the record does not support the trial court's conclusion that the defendant had demonstrated a subjective expectation of privacy in his prescription records. *See* footnote 7 of this opinion. For purposes of this appeal, we accept as true the trial court's finding regarding the defendant's subjective expectation of privacy in those records.

Brown legally obtained the defendant's prescription records without a warrant or the defendant's consent, upon the consent of the pharmacists who voluntarily turned those records over to Brown. The state further claims that the defendant's fourth amendment rights were not violated when Brown, acting as a criminal investigator in concert with the Hartford police, requested and received those prescription records without a search warrant or the defendant's consent. Although we acknowledge that, in general, the defendant has a constitutionally protected privacy interest in his prescription records, we nevertheless conclude that his privacy rights were not violated in this particular case.

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We first address the issue of whether Brown, acting in conjunction with the Hartford police, had statutory authority to obtain records of the defendant's prescriptions for controlled substances in connection with the criminal investigation of the defendant.[17] Specifically, the state claims that a law enforcement official legally may obtain records of prescriptions for controlled substances from a pharmacist upon that pharmacist's consent, without a

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[17] For purposes of this appeal, we limit our analysis to the issue of whether law enforcement officials are authorized to obtain records of prescriptions for *controlled substances* without a warrant or the consent of the person to whom the controlled substances are prescribed. Because the present case involves prescriptions for controlled substances only, it is unnecessary to decide whether law enforcement officials lawfully may obtain records of prescriptions for medications that do not fall within a controlled substance category of drugs. *See*, e.g., *Bortner v. Woodbridge*, 250 Conn. 241, 251 n. 13, 736 A.2d 104 (1999) (court need not decide issues unnecessary to resolution of case).

warrant and without the consent of the person for whom the prescription has been issued. The defendant, in contrast, maintains that law enforcement personnel are not vested with the authority to review prescription records without a warrant. We agree with the state.

The state's claim raises an issue of statutory construction over which our review is plenary. E.g., *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 26, 717 A.2d 77 (1998). "Our resolution of [this claim] is governed by well established principles. [I]t is axiomatic that the process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Connelly v. Commissioner of Correction*, 258 Conn. 394, 403, 780 A.2d 903 (2001).

General Statutes § 21a-265[18] provides in relevant part that "[p]rescriptions . . . shall be open for inspection only

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[18] General Statutes § 21a-265 provides: "Prescriptions, orders and records required by sections 21a-243 to 21a-282, inclusive, and stocks of controlled substances shall be open for inspection only to federal, state, county and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to controlled substances, and to third party payors having a formal agreement or contract to audit such prescriptions, orders and records in connection with claims submitted to such payors. No such officer or third party payor having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a civil

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to federal, state, county and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to controlled substances, and to third party payors having a formal agreement or contract to audit such prescriptions . . . in connection with claims submitted to such payors. . . . " General Statutes § 21a-265 further provides that "[n]o such officer or third party payor having knowledge by virtue of his office of any such prescription . . . shall divulge such knowledge, except in connection with a civil action or criminal prosecution in court or before a licensing or registration board or officer, to which action, prosecution or proceeding the person to whom such prescriptions . . . relate is a party."

By its plain language, § 21a-265 affirmatively authorizes federal, state and local law enforcement personnel to review prescription records, in direct contravention of the construction that the defendant advances.[19] In light of the trial court's finding that Brown was acting in concert with the Hartford police when he obtained the defendant's prescription records, Brown was authorized, under § 21a-265, to obtain those records with the pharmacists' consent.

General Statutes § 21a-265 broadly provides that prescription records shall be "*open for inspection* . . . to federal, state, county and municipal officers, whose duty it

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action or criminal prosecution in court or before a licensing or registration board or officer, to which action, prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party."

[19] The defendant construes § 21a-265 as authorizing only *regulatory* personnel to inspect prescription records in accordance with the requirements of General Statutes § 21a-261; *see* footnote 26 of this opinion; and its federal analogue, 21 U.S.C. § 880. *See* footnote 13 of this opinion.

is to enforce the [federal and state drug laws]. . . . " (Emphasis added.) Because the legislature has not defined the words "open for inspection," we look "to the common understanding of [those words] as expressed in a dictionary." (Internal quotation marks omitted.) *Oxford Tire Supply, Inc. v. Commissioner of Revenue Services,* 253 Conn. 683, 696, 755 A.2d 850 (2000); *see* General Statutes § 1-1(a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly").

"Open" is defined as "so arranged or governed as to permit ingress, egress, or passage . . . completely free from concealment: exposed to general or particular perception or knowledge . . . available to us. . . . " Webster's Third New International Dictionary. "Inspection" is "the act or process of inspecting" and "inspect" means "to view closely and critically (as in order to ascertain quality or state, detect errors, or otherwise appraise): examine with care: scrutinize. . . . " *Id.* Therefore, in construing the language of § 21a-265 according to its plain and ordinary meaning, as we must, we find it apparent that the legislature intended for both criminal law enforcement officials and regulatory personnel to have access to prescription records in connection with the lawful discharge of their duties. [20]

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[20] Of course, the state's interest in reviewing prescription records in the possession of a pharmacist is subject to the right of the *pharmacist* to be free from an unreasonable search of his business premises. *See*, e.g., *New York v. Burger,* 482 U.S. 691, 699, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). It is undisputed, however, that the pharmaceutical

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Moreover, we note the absence in § 21a-265 of any limitation on access to such records by law enforcement personnel who have obtained a search warrant. We conclude that the legislature did not intend such a limitation because if it had, it easily could have expressed that intent. E.g., *Connelly v. Commissioner of Correction,* supra, 258 Conn. at 410, 780 A.2d 903. Indeed, the legislature has deemed it appropriate, in certain circumstances, to relax statutory confidentiality requirements when the information sought is the subject of a search warrant. *See*, e.g., General Statutes § 31-128f (2) (employer may disclose employee's otherwise confidential personnel or medical records pursuant to search warrant); General Statutes § 36a-44 (8) (financial institution authorized to disclose otherwise confidential information regarding customer records

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industry is pervasively regulated, and, therefore, warrantless administrative inspections of pharmacies are permissible as long as those inspections are conducted subject to reasonable legislative or administrative standards. *See*, e.g., *id.*, at 703, 107 S.Ct. 2636; *Donovan v. Dewey,* 452 U.S. 594, 599, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981). Thus, 21 U.S.C. § 880; *see* footnote 13 of this opinion; and General Statutes § 21a-261; *see* footnote 26 of this opinion; were enacted to protect pharmacists from unreasonable, warrantless intrusions by federal and state regulatory personnel responsible for administrative inspections of pharmacy records and stocks of controlled substances. These provisions entitle such personnel to enter a pharmacy without a search warrant to audit the pharmacy's records and its stock of controlled substances only at reasonable times and within reasonable limits. *See* generally 21 U.S.C. § 880(b) (1994); General Statutes § 21a-261 (b). In the present case, however, the pharmacists who voluntarily complied with Brown's requests for the records of the defendant's prescriptions for controlled substances make no claim that Brown's lawful entry into their pharmacies, during working hours, violated *their* rights, thereby entitling *them* to suppression of the records. Because the defendant's rights, and not the pharmacists' rights, are at issue in the present case, the administrative inspection provisions of 21 U.S.C. § 880 and § 21a-261 provide no support for the defendant's claim.

pursuant to search warrant); General Statutes § 38a-988 (h) (insurer may disclose otherwise confidential information concerning insured pursuant to search warrant). Finally, and importantly, the legislative history of § 21a-265 contains no suggestion that the legislature intended for that statutory provision to be construed in a manner other than according to its plain language.

Our conclusion that § 21a-265 allows law enforcement officials access to records of prescriptions for controlled substances is buttressed by other provisions of the statutory scheme regulating the lawful dispensing and use of controlled substances. For example, General Statutes § 21a-250 (a)[21] provides in relevant part that a prescription must be "retained on file by the proprietor of the pharmacy in which it is filled for a period of three years, so as to be *readily accessible for inspection by any public officer or employee engaged in the enforcement of* . . . chapter [420b

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[21] General Statutes § 21a-250 (a) provides: "A pharmacist, in good faith, may sell and dispense controlled substances to any person upon a prescription of a physician or dentist, podiatrist, optometrist, veterinarian, physician assistant licensed pursuant to section 20-12b, advanced practice registered nurse, or nurse-midwife to the extent that they are authorized to prescribe such controlled substances. Except as otherwise provided by regulations adopted pursuant to section 21a-244, the person filling or refilling the prescription shall include the date of filling and the person's signature or initials on any prescription for controlled substances, and the prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of three years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this chapter. The prescription shall not be filled or refilled unless permitted by federal food and drug laws, the federal Controlled Substances Act and regulations adopted under this chapter."

of the General Statutes]. . . . "[22] (Emphasis added.) Because chapter 420b of the General Statutes includes, inter alia, this state's criminal drug laws, it is evident that a central purpose of the record retention requirement of § 21a-250(a) is to ensure that prescriptions will be "accessible for inspection" by law enforcement officials responsible for enforcing those laws.

In addition, General Statutes § 20-626,[23] which mandates the confidentiality of pharmacy records, contains

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[22] Under General Statutes § 21a-249(k), pharmacies also are required to "file filled prescriptions for controlled substances separately from other prescriptions." General Statutes § 21a-249 (k) further provides that "[a]ll schedule II prescriptions shall be filed in a separate file. All schedule III, IV and V prescriptions shall be filed in another separate file except as otherwise provided for in regulations adopted pursuant to section 21a-244. Such controlled substance prescriptions shall, immediately upon filling, be filed chronologically and consecutively."

[23] General Statutes § 20-626 provides: "(a) No pharmacist or pharmacy shall reveal any records or information concerning the nature of pharmaceutical services rendered to a patient without the oral or written consent of the patient or the patient's agent. If a patient or a patient's agent gives oral consent to release records or information, the pharmacist shall promptly record, in writing or in electronic data base form, the oral consent by listing the patient's name, the name of the patient's agent, if applicable, the date and the nature of the records or information released.

"(b) Notwithstanding subsection (a) of this section, a pharmacist or pharmacy may provide pharmacy records or information to the following: (1) The patient; (2) the prescribing practitioner or a pharmacist or another prescribing practitioner presently treating the patient when deemed medically appropriate; (3) a person registered or licensed pursuant to chapter 378 who is acting as an agent for a prescribing practitioner that is presently treating the patient or a person registered or licensed pursuant to chapter 378 providing care to the patient in a hospital; (4) third party payors who pay claims for pharmaceutical services rendered to a patient or who have a formal agreement or contract to audit any records or information in connection with such

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seven separate exceptions to the general rule. One such exception authorizes pharmacists to "provide pharmacy records or information to . . . any governmental agency with statutory authority to review or obtain such information. . . . " General Statutes § 20-626(b)(5). When § 20-626(b)(5) is read in conjunction with § 21a-265, it is apparent that this exception is applicable to law enforcement officials charged with enforcing the criminal laws relating to controlled substances. Moreover, General Statutes § 20-626(b)(6) authorizes pharmacists to provide prescription records to "any individual, the state or federal government or any agency thereof or court pursuant to a subpoena. . . . " It would have been illogical for the legislature to require state and federal law enforcement officials to obtain a search warrant for prescription records under § 21a-265, as the defendant maintains it did, and, at the same time, broadly authorize the dissemination of those records under § 20-626(b)(6) to *any* person or state or federal agency seeking discovery of such information pursuant to a subpoena. *See*, e.g., *Modern Cigarette, Inc. v. Orange,* 256 Conn. 105, 120, 774 A.2d 969 (2001) (statutes are construed using common sense and assuming legislature intended reasonable and rational result).

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claims; (5) any governmental agency with statutory authority to review or obtain such information; (6) any individual, the state or federal government or any agency thereof or court pursuant to a subpoena; and (7) any individual, corporation, partnership or other legal entity which has a written agreement with a pharmacy to access the pharmacy's database provided the information accessed is limited to data which does not identify specific individuals."

Furthermore, General Statutes § 21a-274[24] provides that the commissioners of public health and consumer protection, police officers and all state prosecutors shall cooperate with each other and exchange investigative information relating to criminal violations of the drug laws. This broad statutory mandate is inconsistent with the defendant's construction of § 21a-265:[25] it is unlikely that the legislature would have severely restricted a law enforcement official's access to records of prescriptions for controlled substances by requiring that official to obtain a search warrant, but nevertheless would have granted regulatory personnel full and open access to those records without the need to obtain a warrant; *see* General Statutes § 21a-261,[26] when § 21a-274 authorizes those same

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[24] General Statutes § 21a-274 provides: "(a) The Commissioners of Public Health and Consumer Protection and their authorized agents, police officers within their respective jurisdictions and all state's attorneys and prosecuting attorneys shall cooperate with each other and with other agencies charged with the enforcement of the laws of the United States, of this state and all other jurisdictions relative to controlled substances.

"(b) Notwithstanding the provisions of section 21a-265 and chapter 55 said commissioners and their authorized agents may, in carrying out their duties under subsection (a), (1) exchange information relating to the issuance, suspension or revocation of a license issued by their respective agencies, or (2) exchange investigative information relating to violations of this chapter with each other, with state's attorneys and with other agencies charged with the enforcement of the laws of the United States, and of this state and all other jurisdictions relative to controlled substances."

[25] *See* footnote 19 of this opinion.

[26] General Statutes § 21a-261 provides:

"(a) Every person required by section 21a-254 to prepare or obtain and keep records of controlled substances, and any carrier maintaining records with respect to any shipment containing any controlled substance, and every person in charge, or having custody, of such

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regulatory officials to provide law enforcement officials with any and all information regarding possible violations of the drug laws that they may obtain from their review of the prescription records. Moreover, the fact that the

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records shall, upon request of the Commissioner of Consumer Protection and his authorized agents, permit said commissioner and his authorized agents at reasonable times to have access to and copy such records.

"(b) For the purposes of verification of such records and of the enforcement of this part, said commissioner and his agents, are authorized to enter, at reasonable times, any place, clinic, infirmary, correctional institution, care-giving institution, pharmacy, drug room, office, hospital, laboratory, factory, warehouse, establishment or vehicle in which any controlled substance is held, manufactured, compounded, processed, sold, delivered or otherwise disposed of and to inspect, within reasonable limits and in a reasonable manner, such place, clinic, infirmary, correctional institution, care-giving institution, pharmacy, drug room, office, hospital, laboratory, factory, warehouse, establishment or vehicle, and all pertinent equipment, finished and unfinished material, containers and labeling, and all things therein including records, files, papers, processes, controls and facilities, and to inventory any stock of any such controlled substance therein and obtain samples of any such substance, any labels or containers for such substance and of any finished and unfinished material.

"(c) No inspection authorized by subsection (b) shall extend to (1) financial data, (2) sales data other than shipment data, (3) pricing data, (4) personnel data or (5) research data and secret processes or apparatus.

"(d) Commissioner of Consumer Protection and his authorized agents are authorized and empowered to obtain and serve search warrants and arrest warrants; to seize contraband controlled substances; and to make arrests without warrant for offenses under sections 21a-243 to 21a-282, inclusive, if the offense is committed in their presence or, in the case of a felony, if they have probable cause to believe that the person so arrested has committed, or is committing, such offense. The commissioner and his authorized agents when executing the powers authorized pursuant to this subsection, except when using deadly physical force, shall be deemed to be acting in the capacity of a peace officer as defined in subsection (9) of section 53a-3."

regulatory officers *themselves* have criminal investigatory and arrest powers further undermines the defendant's interpretation of § 21a-265. *See* General Statutes § 21a-261 (d).

Finally, the defendant's construction of § 21a-265 is fundamentally flawed for another important reason: that interpretation renders the entire first sentence of § 21a-265 superfluous. In the defendant's view, § 21a-265 simply limits access to records of prescriptions for controlled substances to federal, state, county and municipal officers. The legislature, however, already has provided for the confidentiality of prescription records under § 20-626; *see* footnote 23 of this opinion; the provisions of which accomplish what the defendant contends that the legislature sought to achieve with the first sentence of § 21a-265. In light of the well established principle that statutory provisions should not be read so as to render them meaningless, unnecessary or superfluous; *see*, e.g., *Ferrigno v. Cromwell Development Associates,* 244 Conn. 189, 196, 708 A.2d 1371 (1998); *State v. State Employees' Review Board,* 239 Conn. 638, 654, 687 A.2d 134 (1997); we conclude that the defendant's construction of § 21a-265 is untenable.

In support of his construction, the defendant contends that reading § 21a-265 to authorize the warrantless access by law enforcement officials to records of prescriptions for controlled substances would raise constitutional concerns under *New York v. Burger,* 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), in which the United States Supreme Court concluded that pervasively regulated businesses are subject to warrantless inspections by regulatory personnel as long as those inspections are accomplished in a reasonable manner. *See id.*, at 703, 107 S.Ct. 2636. This argument is without merit. As we have indicated; *see* footnote

20 of this opinion; the standards enunciated in *Burger* are in place to protect the fourth amendment rights of the *proprietors* of pervasively regulated businesses; *see New York v. Burger, supra*, at 702-703, 107 S.Ct. 2636; who, in the present case, are the pharmacists who voluntarily complied with Brown's requests for the defendant's prescription records. Thus, § 21a-265 does not violate the pharmacist's rights because it merely authorizes law enforcement personnel to review records of prescriptions for controlled substances upon lawfully obtaining them from a pharmacist; § 21a-265 *does not require* a pharmacist to comply with a request by law enforcement officials to review prescription records in the pharmacist's possession.[27] Thus, our interpretation of § 21a-265 in accordance with its plain language, which distinctly authorizes federal, state and local enforcement personnel to review prescription records in carrying out their official duties, is not contrary to the dictates of *Burger* because § 21a-265 simply does not implicate the fourth amendment rights of a pharmacist who, as in the present case, *voluntarily* complies with a law enforcement official's request for prescription records.[28]

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[27] Thus, if a pharmacist were to refuse to comply with a request by a law enforcement official to review prescription records in that pharmacist's possession, the law enforcement official would be required to seek court approval to obtain the records. Of course, such records also would be subject to inspection by state regulatory personnel in connection with an otherwise lawful administrative inspection of the pharmacy. *See* General Statutes § 21a-261.

[28] The trial court relied on the principles enunciated in *Burger* in concluding that the defendant was entitled to suppression of the prescription records. That reliance is misplaced, however, because, in the present case, the privacy rights of the defendant, a customer of the

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In sum, we conclude that § 21a-265 authorizes law enforcement officials to obtain records of prescriptions for controlled substances from a pharmacist without a warrant, subject, of course, to consideration of the pharmacist's constitutional rights. Although, arguably, as a matter of public policy, the law enforcement officials *should* be required to obtain prior court approval or the prior consent of the person whose prescription records are sought before gaining access to those records, it is not this court's prerogative to adopt such a policy in the face of an unequivocal legislative mandate to the contrary. In light of our conclusion, however, it remains for this court to determine whether § 21a-265 gives rise to an unconstitutional invasion of the defendant's privacy rights by having authorized pharmacists to release to Brown records of the defendant's prescriptions for controlled substances.[29] We now turn to that issue.

## II

The state claims that the trial court improperly concluded that the defendant's constitutional right of

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pharmacy, as opposed to the privacy rights of the pharmacist himself, are at issue.

[29] Because the defendant does not agree that § 21a-265 authorizes the police to obtain records of prescriptions for controlled substances without a warrant, even upon the consent of the pharmacist, the defendant has not addressed the constitutionality of that provision as so interpreted. Although we disagree with the defendant regarding the import of § 21a-265, we are in agreement, of course, that the dispositive issue presented by this appeal concerns the constitutionality of the conduct of the Hartford police, acting by and through Brown, in obtaining the defendant's prescription records, regardless of whether that conduct was statutorily authorized.

privacy was violated when Brown obtained the defendant's prescription records without a search warrant and without the defendant's consent. We agree.

In *Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the United States Supreme Court first recognized a constitutionally protected right of privacy. In *Griswold,* the court concluded that a state law barring the use of contraceptives by married couples violated that right. *Id.* The United States Supreme Court subsequently confirmed that that right of privacy "is founded in the Fourteenth Amendment's concept of personal liberty. . . . " (Citation omitted.) *Whalen v. Roe,* 429 U.S. 589, 598-99 n. 23, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *see* also *Roe v. Wade,* 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action"). "Although the [United States Supreme] [C]ourt has . . . construed this right to privacy narrowly . . . it has held that personal rights that are implicit in the concept of ordered liberty . . . or deeply rooted in this Nation's history and tradition are included in this guarantee of personal privacy." (Citation omitted; internal quotation marks omitted.) *In re Michaela Lee R.,* 253 Conn. 570, 599, 756 A.2d 214 (2000).

Though the boundaries of the constitutional right of privacy have not been delineated clearly, cases involving that right generally have addressed two distinct interests: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe, supra,* 429 U.S. at 599-600, 97 S.Ct. 869; *see* also *Nixon v. Administrator of General Services,* 433

U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (reaffirming right of privacy in avoiding disclosure of personal matters).

The present case involves the first of these two interests, which "can be characterized as a right to confidentiality, [as] distinguish[ed] . . . from the right to autonomy and independence in decision-making for personal matters . . . ."[30] *Doe v. New York,* 15 F.3d 264, 267 (2d Cir.1994).

A majority of the federal Circuit Courts of Appeals have concluded that this constitutionally protected right to confidentiality extends to medical information or records. E.g., *Herring v. Keenan,* 218 F.3d 1171, 1175 (10th Cir.2000), cert. denied, ___ U.S. ___, 122 S.Ct. 96, 151 L.Ed.2d 56 (2001); *Doe v. Southeastern Pennsylvania Transportation Authority,* 72 F.3d 1133, 1137 (3d Cir.1995),

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[30] At least one federal Circuit Court of Appeals has expressed "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information." *American Federation of Government Employees, AFL-CIO v. Dept. of Housing & Urban Development,* 118 F.3d 786, 791 (D.C.Cir.1997) (noting that United States Supreme Court cases discussing this right have done so in dicta only). The vast majority of federal courts, however, expressly have recognized the existence of a constitutional right of privacy with respect to the nondisclosure of personal data or information. E.g., *Sterling v. Minersville,* 232 F.3d 190, 196 (3d Cir.2000); *Denius v. Dunlap,* 209 F.3d 944, 955 (7th Cir.2000); *Statharos v. New York City Taxi & Limousine Commission,* 198 F.3d 317, 322-23 (2d Cir.1999); *In re Crawford,* 194 F.3d 954, 958-59 (9th Cir.1999), cert. denied sub nom. *Ferm v. United States Trustee,* 528 U.S. 1189, 120 S.Ct. 1244, 146 L.Ed.2d 102 (2000); *Kallstrom v. Columbus,* 136 F.3d 1055, 1061-62 (6th Cir.1998); *Eagle v. Morgan,* 88 F.3d 620, 625 (8th Cir.1996); *Cantu v. Rocha,* 77 F.3d 795, 806 (5th Cir.1996); *Sheets v. Salt Lake County,* 45 F.3d 1383, 1387 (10th Cir.), cert. denied, 516 U.S. 817, 116 S.Ct. 74, 133 L.Ed.2d 34 (1995); *Walls v. Petersburg,* 895 F.2d 188, 192 (4th Cir.1990); *Daury v. Smith,* 842 F.2d 9, 13 (1st Cir.1988).

cert. denied, 519 U.S. 808, 117 S.Ct. 51, 136 L.Ed.2d 15 (1996); *Anderson v. Romero,* 72 F.3d 518, 522 (7th Cir.1995); *Doe v. New York, supra,* 15 F.3d at 267 (2d Cir.1994); *Doe v. Attorney General of the United States,* 941 F.2d 780, 795-96 (9th Cir.1991), vacated on other grounds sub nom. *Reno v. Doe,* 518 U.S. 1014, 116 S.Ct. 2543, 135 L.Ed.2d 1064 (1996); *see* also *Harris v. Thigpen,* 941 F.2d 1495, 1513 (11th Cir.1991) (assuming such right exists). Contra *Jarvis v. Wellman,* 52 F.3d 125, 126 (6th Cir.1995) (holding that constitutional right of privacy does not apply to medical records). Moreover, some courts specifically have concluded that prescription records are the type of medical record that falls within the zone of privacy protected by the constitution. E.g., *Doe v. Southeastern Pennsylvania Transportation Authority, supra,* at 1138; *State v. Welch,* 160 Vt. 70, 78, 624 A.2d 1105 (1992); cf. *Whalen v. Roe, supra,* 429 U.S. at 600-602, 97 S.Ct. 869.

Because prescription records may contain information of a private nature regarding a person's physical or mental health,[31] we agree with the defendant that, as a general matter, a person reasonably may expect that his or her prescription records or information contained therein will not be disseminated publicly. The privacy protection afforded such records or information, however, is not absolute. *Doe v. Southeastern Pennsylvania Transportation*

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[31] It is noteworthy, however, that a prescription for a particular controlled substance will not necessarily reveal any intimate or personal details about a person's health. For example, in the present case, the sole charges against the defendant stem from his allegedly illegal conduct in obtaining Tylenol 3, a controlled substance generally prescribed for pain relief. The mere fact that the defendant obtained prescriptions for Tylenol 3 reveals nothing about the source or cause of his pain, or anything else about the state of the defendant's health.

*Authority, supra*, 72 F.3d at 1138; *see Doe v. New York, supra*, 15 F.3d at 269; *Doe v. Attorney General of the United States, supra*, 941 F.2d at 796. "[R]ather, it is a conditional right which may be infringed upon a showing of proper governmental interest." *Doe v. Attorney General of the United States, supra*, at 796; *see* also *Statharos v. New York City Taxi & Limousine Commission*, 198 F.3d 317, 323 (2d Cir.1999) ("[t]his confidentiality interest is not absolute . . . and can be overcome by a sufficiently weighty government purpose"); *Doe v. Southeastern Pennsylvania Transportation Authority, supra*, at 1138 ("[a]s with many individual rights, the right of privacy in one's prescription drug records must be balanced against important competing interests"); *Doe v. New York, supra*, at 269 ("[the] right to confidentiality in [one's medical] status is no more absolute than the right to control access to other types of personal information"); *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir.1988) ("[t]he privacy right . . . [in confidential information] must often give way to considerations of public interest"). In other words, the reasonableness of a person's expectation that his or her personal or intimate medical information will not be disclosed depends upon the circumstances underlying the particular disclosure. Indeed, in the present case, the defendant does not claim that his right of privacy with respect to his prescription records is absolute, for he expressly acknowledges the right of the state to authorize systematic reviews of such records by third party payors *and* regulatory personnel, the latter of whom have, in addition to their administrative responsibilities, investigatory and arrest authority pursuant to § 21a-261 (d).

Courts generally have applied a balancing test to determine whether the disclosure of personal or confidential

information is constitutionally permissible under the particular facts and circumstances presented. For example, the Second Circuit Court of Appeals has concluded that "some form of intermediate scrutiny or balancing approach is appropriate as a standard of review. . . . "[32]

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[32] The panel of the Second Circuit Court of Appeals in *Barry v. New York*, 712 F.2d 1554 (2d Cir.), cert. denied, 464 U.S. 1017, 104 S.Ct. 548, 78 L.Ed.2d 723 (1983), explained its conclusion as follows: "The confidentiality branch of the right to privacy was at issue in *Whalen v. Roe, supra* [429 U.S. 589], 97 S.Ct. 869. In that case, the [United States] Supreme Court upheld a New York statute authorizing the state to record the names and addresses of patients who received prescriptions for certain drugs, but stated that individuals have a protectible interest in avoiding disclosure of personal matters. [*Id.*, at 599], 97 S.Ct. 2474. The existence of that interest was reaffirmed in *Nixon v. Administrator of General Services, supra*, [433 U.S. at 457], 97 S.Ct. 2777, a case in which the [United States] Supreme Court upheld [a law] providing for the screening of former President Nixon's presidential materials to segregate official documents for public preservation from personal documents for return to Mr. Nixon.

"The nature and extent of the interest recognized in *Whalen* and *Nixon*, and the appropriate standard of review for alleged infringements of that interest, are unclear. . . . Most courts considering the question, however, appear to agree that privacy of personal matters is a protected interest . . . and that some form of intermediate scrutiny or balancing approach is appropriate as a standard of review. . . . The [United States] Supreme Court itself appeared to use a balancing test in *Nixon v. Administrator of General Services*, [*supra*, 433 U.S. at 458], 97 S.Ct. 2777. Moreover, an intermediate standard of review seems in keeping both with the [United States] Supreme Court's reluctance to recognize new fundamental interests requiring a high degree of scrutiny for alleged infringements, and the Court's recognition that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality interest." (Citations omitted; internal quotation marks omitted.) *Barry v. New York, supra*, 712 F.2d at 1559.

This court generally gives special weight to the decisions of the Second Circuit Court of Appeals in cases in which we are called upon to apply federal law. *See State v. Faria*, 254 Conn. 613, 625 n. 12, 758 A.2d 348 (2000); cf. *Schnabel v. Tyler*, 230 Conn. 735, 743, 646 A.2d 152 (1994).

(Citation omitted.) *Barry v. New York,* 712 F.2d 1554, 1559 (2d Cir.), cert. denied, 464 U.S. 1017, 104 S.Ct. 548, 78 L.Ed.2d 723 (1983); *see* also *Statharos v. New York City Taxi & Limousine Commission, supra,* 198 F.3d at 324 (applying intermediate scrutiny); *Immediato v. Rye Neck School District,* 73 F.3d 454, 463 (2d Cir.), cert. denied, 519 U.S. 813, 117 S.Ct. 60, 136 L.Ed.2d 22 (1996) (same); *Doe v. New York, supra,* 15 F.3d at 269 (same). The Courts of Appeals for the Third and Fifth Circuits also apply this intermediate balancing approach. *Doe v. Southeastern Pennsylvania Transportation Authority, supra,* 72 F.3d at 1139; *National Treasury Employees Union v. United States Dept. of the Treasury,* 25 F.3d 237, 243 n. 2 (5th Cir.1994); cf. *In re Crawford,* 194 F.3d 954, 959 (9th Cir.1999), cert. denied sub nom. *Ferm v. United States Trustee,* 528 U.S. 1189, 120 S.Ct. 1244, 146 L.Ed.2d 102 (2000) (applying comparable balancing test); *Bloch v. Ribar,* 156 F.3d 673, 684 (6th Cir.1998) (same); *Hester v. Milledgeville,* 777 F.2d 1492, 1497 (11th Cir.1985) (same).

Whatever may be the precise contours of the applicable balancing test, this case is controlled by *Whalen v. Roe, supra,* 429 U.S. at 589, 97 S.Ct. 869, in which the United States Supreme Court considered a constitutional claim identical in all material respects to the claim that the defendant raises in the present case. *See id.,* at 591, 97 S.Ct. 869. The United States Supreme Court, after considering the pertinent factors, determined that the challenged disclosure of prescription information did not invade "any right or liberty protected by the Fourteenth Amendment." *Id.,* at 604, 97 S.Ct. 869. In *Whalen,* a group of patients and physicians, among others, challenged the constitutionality of a New York statutory scheme requiring physicians to forward records of prescriptions for schedule

II drugs, which contained detailed patient information, to a centralized database maintained by the state department of health.[33] *See* generally *id.*, at 593-95, 97 S.Ct. 869. Although public disclosure of the identity of the patient was prohibited under the statutory scheme; *id.*, at 594, 97 S.Ct. 869; certain state regulatory employees and personnel responsible for investigating violations of New York's controlled substance laws [34] were afforded access to that information. *See id.*, at 595, 97 S.Ct. 869. A unanimous United States Supreme Court concluded, first, that the statutory scheme "was a reasonable exercise of New York's broad police powers"; *id.*, at 598, 97 S.Ct. 869; and enacted in furtherance of "the [s]tate's vital interest in controlling the distribution of dangerous drugs . . . ." *Id.* In addition, the court concluded that, in light of the statutory prohibition against the public dissemination of the prescription information, the risk of such dissemination was insufficient to invalidate the challenged statutory scheme. *See id.*, at 600-602, 97 S.Ct. 869. Although the court acknowledged that, under the statutory scheme, "private [prescription] information must be disclosed to . . . authorized

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[33] The New York statutory scheme required physicians to submit a form to the state department of health that identified "the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient." *Whalen v. Roe, supra*, 429 U.S. at 593, 97 S.Ct. 869.

[34] The court in *Whalen* noted that persons with access to the database included "investigators with authority to investigate cases of overdispensing which might be identified by the computer." *Whalen v. Roe, supra*, 429 U.S. at 595, 97 S.Ct. 869. These investigators were employees of the New York bureau of narcotic control, an agency "empowered to investigate violations of the [New York] Public Health law and of Schedule II regulations." *Roe v. Ingraham*, 403 F.Supp. 931, 934 (S.D.N.Y.1975), rev'd sub nom. *Whalen v. Roe, supra*, at 589, 97 S.Ct. 869.

[state] employees"; *id.*, at 602, 97 S.Ct. 869; it nonetheless observed that "[s]uch disclosures . . . are not . . . meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when th[ose] disclosure [s] may reflect unfavorably on the character of the patient[s]." *Id.* The court then concluded that the challenged statutory scheme, in mandating the disclosure of the prescription information to representatives of the state having responsibility for the health and welfare of the community, did not create an impermissible invasion of privacy. *Id.*, at 603-604, 97 S.Ct. 869.

*Whalen* is indistinguishable from the present case. Our statutory scheme, like the New York statutory scheme considered in *Whalen,* safeguards the privacy interests of persons who obtain prescriptions for controlled substances by restricting access to those records to a limited class of persons; *see* General Statutes §§ 20-626(b) and 21a-265; including public officials responsible for the enforcement of the federal and state drug laws. General Statutes § 21a-265. Both states' regimes prohibit the dissemination of such information to the general public. *See* General Statutes § 20-626; *cf. Whalen v. Roe, supra*, 429 U.S. at 600, 97 S.Ct. 869. As the Second Circuit Court of Appeals recently has observed, "[t]he degree of intrusion stemming from public exposure of the details of a person's life is

exponentially greater than [that stemming from] disclosure to government officials."[35] (Internal quotation marks omitted.) *Statharos v. New York City Taxi & Limousine Commission, supra*, 198 F.3d at 326, quoting *Barry v. New York, supra*, 712 F.2d at 1561; *see* also *American Federation of Government Employees, AFL-CIO v. Dept. of Housing & Urban Development,* 118 F.3d 786, 793 (D.C.Cir.1997) ("we hold that the individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly"); *Stone v. Stow,* 64 Ohio St.3d 156, 166, 593 N.E.2d 294 (1992) ("[w]hatever privacy interest . . . patients and physicians possess in . . . prescription records is limited to the right not to have the information disclosed to the general public"). Moreover, as in *Whalen,* nothing in the record of the present case suggests that the law enforcement officials authorized pursuant to § 21a-265 to obtain records of the defendant's prescriptions for controlled substances without a warrant have failed to abide by the stringent statutory nondisclosure provisions,

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[35] Thus, Justice William J. Brennan, in his concurring opinion in *Whalen,* distinguished between the constitutionally permissible collection of prescription data by state officials and the "[b]road dissemination" of prescription information *by* those officials, a practice that, according to Justice Brennan, "would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." *Whalen v. Roe, supra*, 429 U.S. at 606, 97 S.Ct. 869 (Brennan, J., concurring). But *see id.*, at 607-609, 97 S.Ct. 869 (Stewart, J., concurring) (expressing doubt that even broad dissemination of prescription records by state officials would implicate any constitutionally protected right).

or that they likely will flout those provisions in the future.[36] *See Whalen v. Roe, supra*, at 601, 97 S.Ct. 869 (refusing to assume that standards of nondisclosure will be violated).

Furthermore, because the pharmaceutical industry is pervasively regulated, prescription information and records are legitimately subject to regular scrutiny by federal and state inspectors and, consequently, the expectation of privacy that the public has in that information or those records, in contrast to other types of information that are not subject to such intensive review and regulation, necessarily is reduced drastically.[37] *See*, e.g., *California v. Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (due to pervasive regulation of vehicles

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[36] Of course, in the event that a law enforcement official were to abuse his or her authority under § 21a-265 by gaining access to prescription records for a retaliatory or other improper purpose, such illegal conduct could provide the basis for a motion to dismiss the information on the ground of vindictive or selective prosecution. *See*, e.g., *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir.2000); *United States v. Koh*, 199 F.3d 632, 640 (2d Cir.1999). In addition, the offending law enforcement official surely would be subject to severe administrative sanctions. Moreover, a person who has not committed any offense but whose prescription records have been obtained by the police for improper or unlawful purposes likely would be entitled to a civil recovery stemming from that misconduct. The record of this case, however, does not establish either that the criminal investigation of the defendant was improperly motivated or that law enforcement personnel ever improperly disclosed the defendant's prescription records or information.

[37] As the United States Supreme Court emphasized in *Whalen*, the expectation of privacy that a person has in information about his or her prescriptions is reduced by virtue of the routine disclosure of that information not only to regulatory officials, but also to insurers, health care providers and hospital personnel. *Whalen v. Roe, supra*, 429 U.S. at 602, 97 S.Ct. 869.

capable of traveling on public highways, public has reduced privacy expectation in motor vehicles); *Condon v. Reno,* 155 F.3d 453, 464-65 (4th Cir.1998) (same), rev'd on other grounds, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000). Indeed, the fact that § 21a-265 expressly authorizes law enforcement officials to obtain records of prescriptions for controlled substances without a warrant reflects a considered public policy judgment that, in and of itself, serves to diminish a person's expectation of privacy in such records. *See*, e.g., *Yin v. California,* 95 F.3d 864, 871 (9th Cir.1996), cert. denied, 519 U.S. 1114, 117 S.Ct. 955, 136 L.Ed.2d 842 (1997) (statute explicitly authorizing medical examinations of state civil service employees places those employees on notice that they can be subject to such examination, thereby diminishing their expectation of privacy accordingly); *see* also, e.g., *Doe v. Southeastern Pennsylvania Transportation Authority, supra,* 72 F.3d at 1140 (existence of express statutory mandate or articulated public policy favoring disclosure of particular information is factor militating against conclusion that such disclosure constitutes cognizable invasion of privacy).

It is telling that the defendant has cited to no case, and we are aware of none, in which a court has held that a law enforcement official's access to prescription records violates the patient's right of privacy. Indeed, in light of *Whalen* and its progeny, it is not surprising that the only courts to have considered such a claim squarely have rejected it. *Stone v. Stow, supra,* 64 Ohio St.3d at 166, 593 N.E.2d 294; *State v. Welch, supra,* 160 Vt. at 83-84, 624 A.2d 1105. The reason is plain: *Whalen* makes it perfectly clear that a legitimate request for prescription information or records by a public official responsible for safeguarding public health and safety is a valid exercise of the state's

police powers and, consequently, does not constitute an impermissible invasion of privacy. *Strong v. Board of Education,* 902 F.2d 208, 212 (2d Cir.), cert. denied, 498 U.S. 897, 111 S.Ct. 250, 112 L.Ed.2d 208 (1990); *Gutierrez v. Lynch,* 826 F.2d 1534, 1539 (6th Cir.1987). In other words, a person does not have an *objectively reasonable* expectation that records of his or her prescriptions for controlled substances will not be disclosed to law enforcement personnel, subject to safeguards against further dissemination of those records, upon an appropriate request for those records by such personnel.

Although the defendant concedes that he has a reduced expectation of privacy in records of his prescriptions for controlled substances owing to the existence of a regulatory scheme authorizing state and federal regulatory personnel to conduct regular inspections of those records, he nevertheless maintains that his reasonable expectation of privacy in those records is reduced only to the extent necessary to accomplish that regulatory purpose. In essence, the defendant's claim devolves into the proposition that the inspection of records of prescriptions for controlled substances by *law enforcement* personnel, as opposed to *regulatory* personnel, violates a person's reasonable expectation of privacy in those records.

This contention simply ignores *Whalen.* In *Whalen,* the United States Supreme Court expressly acknowledged that the prescription information submitted to the state database by prescribing physicians was subject to review by state officials *authorized to investigate violations of the laws governing the dispensing of prescription medication; Whalen v. Roe, supra,* 429 U.S. at 595, 97 S.Ct. 869; *see* footnote 34 of this opinion and accompanying text; but nevertheless concluded that the statutory scheme did not

contravene the patients' privacy rights. *Whalen v. Roe, supra*, at 602, 97 S.Ct. 869. In so holding, the court drew no distinction between the patients' rights vis-a-vis the investigators, on the one hand, and the patients' rights vis-a-vis the regulatory personnel of the New York department of health, on the other hand. *See* generally *id.* Moreover, the court in *Whalen* noted that the central reporting system at issue in that case was established to prevent *criminal* misconduct by doctors, pharmacists *and patients*.[38] *See* generally *id.*, at 591-92 & n. 6, 97 S.Ct. 869.

Moreover, employees of the department of consumer protection who are responsible for the routine, administrative inspection of prescription records in the possession of pharmacies have full police power to enforce the state's

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[38] The court in *Whalen* explained: "Many drugs have both legitimate and illegitimate uses. In response to a concern that such drugs were being diverted into unlawful channels, in 1970 the New York Legislature created a special commission to evaluate the State's drug-control laws. The commission found the existing laws deficient in several respects. There was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from obtaining prescriptions from more than one doctor, or to prevent doctors from over-prescribing, either by authorizing an excessive amount in one prescription or by giving one patient multiple prescriptions. In drafting new legislation to correct such defects, the commission consulted with enforcement officials in California and Illinois where central reporting systems were being used effectively." *Whalen v. Roe, supra*, 429 U.S. at 591-92, 97 S.Ct. 869. The court further noted that the chairman of the temporary state commission to evaluate the drug laws, in his summary of the commission's findings, explained that "[l]aw enforcement officials in both California and Illinois ha[d] been consulted in considerable depth about the use of multiple prescriptions, since they ha[d] been using them for a considerable period of time. They indicate[d] to us that they are . . . a useful adjunct to the proper identification of culpable professional[s] and unscrupulous drug abusers. . . . " (Internal quotation marks omitted.) *Id.*, at 592 n. 6, 97 S.Ct. 869.

criminal drug laws, including the authority to make arrests and seize evidence, pursuant to § 21a-261(d). This fact underscores the artificial nature of the distinction that the defendant necessarily must draw between his conclusion that a person does not have a reasonable expectation of privacy with respect to his or her records of prescriptions for controlled substances in the context of regulatory inspections, on the one hand, and his conclusion that a person does have such an expectation of privacy in the context of inspections by law enforcement personnel, on the other hand. Both the dictates of *Whalen* and common sense compel this court to reject the defendant's claim that any such distinction is *constitutionally* significant.[39]

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[39] The defendant's flawed analysis appears to stem from his concern about the *consequences* of a targeted review of an individual's prescription records by law enforcement officials. We agree that it reasonably may be presumed that such a review is more likely to reveal criminal conduct than a routine regulatory inspection and, therefore, more likely to result in the filing of criminal charges. That fact, however, is irrelevant to the issue of whether a law enforcement official's inspection of records of a person's prescriptions for controlled substances gives rise to a privacy invasion of *constitutional* magnitude. As we discussed previously, records of an individual's prescriptions for controlled substances lawfully are subject to review by a host of different people, including state consumer protection agents empowered to investigate and arrest persons for criminal violations of the drug laws. *See* General Statutes § 21a-261 (d). Consequently, that individual has a greatly reduced privacy expectation in those records, and, thus, any marginal loss of privacy that an individual may suffer as a result of an inspection of his or her records of prescriptions for controlled substances in connection with a criminal investigation is insignificant in relation to the privacy invasion to which he *already* has been subjected. It is the minimal nature of that additional intrusion, not the added potential for arrest and prosecution, that governs the determination of whether the intrusion has constitutional implications.

This court's analysis in *State v. DeFusco,* 224 Conn. 627, 620 A.2d 746 (1993), highlights the illogic of the distinction that the defendant urges. In *DeFusco,* we upheld the constitutionality of a warrantless search of garbage that the defendant, Paul DeFusco, had placed at the curb in front of his home for collection by the garbage collector. *Id.*, at 639, 620 A.2d 746. We explained that DeFusco could not have had a reasonable expectation of privacy from inspection of that garbage by the police in light of the "myriad of intruders, purposeful or errant, [who] could legally have sorted through his garbage." *Id.*, at 636, 620 A.2d 746. We explained that "[a] person's reasonable expectations as to a particular object cannot be [so] compartmentalized . . . ." *Id.*, at 637, 620 A.2d 746. In the present case, the defendant concedes that he has no reasonable expectation of privacy in his prescription records protecting him against the warrantless inspection of those records by state regulatory agents and others, including third party payors. Under the reasoning of *DeFusco,* the defendant does not have a reasonable expectation of privacy in those records protecting him against warrantless inspections by *law enforcement officials* either. In other words, although an individual legitimately may expect that his records of prescriptions for controlled substances will not be disclosed to the *general public* – an expectation that the legislature has recognized as reasonable; *see* General Statutes §§ 20-626 and 21a-265 – that same individual cannot reasonably expect that certain government officials responsible for safeguarding public health and safety *will* be permitted to review those records while other government officials with the same responsibility *will not.* It is precisely this kind of compartmentalized, bifurcated expectation of privacy that we rejected in *DeFusco.* This expectation is especially unreasonable in

the present case in light of the broad law enforcement powers that § 21a-261 (d) bestows upon department of consumer protection agents who are responsible for inspecting prescription records.[40]

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[40] The dissent's assertion that footnote 32 of the majority opinion in *Whalen v. Roe, supra*, 429 U.S. at 604, 97 S.Ct. 869, supports the conclusion that *Whalen* is distinguishable from the present case – a claim that the defendant himself has not raised – is entirely without merit. In that footnote, the court noted that the plaintiffs, relying on *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), had alleged that a constitutionally protected privacy right in their prescription information emanated not only from the due process clause of the fourteenth amendment, but also from the fourth amendment. *Whalen v. Roe, supra*, at 604 n. 32, 97 S.Ct. 869. After distinguishing the nature of the privacy rights at issue in *Terry* and *Katz* – cases that involved state intrusions into core fourth amendment values – from the confidentiality interest asserted under the facts of *Whalen*, the court then *rejected* the plaintiffs' contention that the fourth amendment provided a separate and independent basis for their claim of a constitutional right of privacy in their prescription information. *Id.* The dissent turns this conclusion on its head by asserting that the *refusal* of the court in *Whalen* to acknowledge a separate and distinct fourth amendment underpinning to the plaintiffs' privacy claim somehow lends support to the contention that *Whalen* does not control the present case. In misconstruing footnote 32 as it does, the dissent misperceives the import of the fourth and fourteenth amendments in relation to the defendant's claims: the defendant has a qualified right of privacy in his prescription records emanating from the fourteenth amendment; to the extent that his qualified privacy right in those records allegedly gives rise to a reasonable expectation of privacy in the particular context of a *criminal* case, he may seek to invoke the protections of the fourth amendment to suppress the *state's use* of those records against him at a criminal trial. Moreover, the dissent's reading of footnote 32 of the majority opinion in *Whalen* is wrong for yet another, more fundamental reason: it simply cannot be squared with the holding of *Whalen* that the New York statutory scheme did not violate the plaintiffs' constitutional rights even though, under that scheme, the prescription information was subject to warrantless inspections by state investigators responsible for enforcing the state's

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In light of the state's strong interest in regulating and policing the distribution of potentially harmful drugs [41] – a category into which controlled substances indisputably fall[42] – and in light of the restrictions that the statutory scheme places upon the disclosure of prescription information and records, the conclusion is inescapable that, under the holding and rationale of *Whalen*, the defendant's privacy rights were not violated when Brown obtained records of the defendant's prescriptions for controlled substances in the course of assisting the Hartford police in investigating the defendant.[43] Accordingly, we conclude

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*criminal* drug laws. *See Whalen v. Roe, supra*, at 595, 603-604, 97 S.Ct. 869.

[41] The United States Supreme Court has recognized the "severe and intractable nature of [our nation's] drug problem. . . ." *Indianapolis v. Edmond*, 531 U.S. 32, 42, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000); *see* also *In re Subpoena Duces Tecum*, 228 F.3d 341, 351 (4th Cir.2000) (patients' privacy interests in medical files compiled by their treating physicians are outweighed by government's "compelling interest in identifying illegal activity and in deterring future misconduct").

[42] *See*, e.g., 21 U.S.C. § 812(b) (1994) (indicating that controlled substances, if abused, have potential to cause physical or psychological dependence); General Statutes § 21a-243 (c) (same); *see* also *Whalen v. Roe, supra*, 429 U.S. at 592, 97 S.Ct. 869 (schedules of controlled substances classify potentially harmful drugs).

[43] Although the defendant himself makes no mention of the special needs cases; *see*, e.g., *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666, 679, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); cf. *Ferguson v. Charleston*, 532 U.S. 67, 84, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001); *Indianapolis v. Edmond*, 531 U.S. 32, 41-42, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000); the dissent relies heavily on these cases in support of its conclusion that the defendant's constitutionally protected privacy rights were violated. This reliance is misplaced. First, the dissent points to nothing in the special needs cases that casts any doubt on the continued vitality of *Whalen v. Roe, supra*, 429 U.S. at 589, 97 S.Ct. 869, which, as we have explained, is legally indistinguishable from the present case. Furthermore, the special needs

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that the trial court improperly granted the defendant's motion to suppress the defendant's prescription records.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion to suppress and for further proceedings according to law.

In this opinion KATZ and ZARELLA, Js., concurred.

SULLIVAN, C.J., with whom VERTEFEUILLE, J., joins, dissenting.

The majority concludes that the warrantless search and seizure of the pharmacy records of the defendant, Nicholas Russo, by a drug enforcement agency officer, Marcus Brown, during the course of a criminal investigation did not violate the fourth amendment. I respectfully disagree.

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doctrine simply does not bear upon the issue raised in the present case, in which the defendant, like the patients in *Whalen*, cannot prevail on his constitutional claim because he has a drastically reduced expectation of privacy in records of his prescriptions for controlled substances in light of the extent to which those records properly are subject to inspection. *See id.*, at 602, 97 S.Ct. 869. Under the special needs doctrine, the government does not seek to justify a warrantless search or seizure on the ground that the individual subject to that intrusion already has a sufficiently reduced expectation of privacy such that a further privacy intrusion by the government is not constitutionally meaningful. To the contrary, the claimed justification for breaching the individual's *otherwise reasonable expectation of privacy* under a special needs rationale is a special need to do so that is *beyond the needs of ordinary law enforcement. See*, e.g., *National Treasury Employees Union v. Von Raab, supra*, at 666, 109 S.Ct. 1384. By contrast, in *Whalen*, the court expressly approved a statutory scheme designed specifically to assist the state in enforcing its criminal drug laws because the means chosen by the state did not violate the patients' *already reduced* expectation of privacy in their prescription records. *See Whalen v. Roe, supra*, at 602, 97 S.Ct. 869. Thus, the special needs cases relied upon by the dissent are wholly inapposite to the present case.

I first note that I am puzzled by the majority's analysis of General Statutes § 21a-265.[1] On the one hand, the majority concludes that "§ 21a-265 affirmatively authorizes federal, state and local law enforcement personnel to review prescription records . . . ." On the other hand, it concludes that the statute "does not require a pharmacist to comply with a request by criminal law enforcement officials to review prescription records in the pharmacist's possession," but that such an inspection may be compelled pursuant to General Statutes § 21a-261. *See* footnote 27 of the majority opinion. If that is the case, I cannot perceive what affirmative authority § 21a-265 provides, nor can I perceive how the majority's reading of the statute differs from my reading that it is intended to be a shield for pharmacy owners and operators, and other persons with privacy interests in pharmacy records, not a sword for government officials seeking access to those records. Accordingly, I do not see why it is necessary to consider the constitutionality of that statute or of the only statutes that, in my view, do provide government officials with affirmative authority to inspect pharmacy records, namely, § 21a-261[2] and that statute's federal counterpart, 21 U.S.C. § 880.[3] None of those statutes purports to authorize a warrantless search of pharmacy records for criminal law enforcement purposes.[4]

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[1] *See* footnote 18 of the majority opinion for the text of General Statutes § 21a-265.

[2] *See* footnote 26 of the majority opinion for the text of General Statutes § 21a-261.

[3] *See* footnote 13 of the majority opinion for the text of 21 U.S.C. § 880.

[4] The majority states that, while § 21a-265 "affirmatively authorizes" inspection of pharmacy records, § 21a-261 and 21 U.S.C. § 880

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Rather, I would conclude that the question to be answered is whether, under the fourth amendment, the government may compel disclosure of sensitive personal information for a valid regulatory purpose and then use that information for criminal law enforcement purposes. The majority, relying on *Whalen v. Roe,* 429 U.S. 589, 591, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), concludes that it may. I disagree.

In *Whalen,* the United States Supreme Court considered the constitutionality, under the fourteenth amendment, of the New York State Controlled Substances Act of 1972; N.Y. Pub. Health Law § 3300 et seq. (McKinney Sup.1976-1977). The statute required the recording, in a centralized computer file, of the names and addresses of all persons who had obtained certain drugs pursuant to prescriptions from physicians. *Whalen v. Roe, supra*, 429 U.S. at 591, 97 S.Ct. 869. The law had been enacted to correct defects in the preexisting law, under which "[t]here was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from

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"were enacted to protect pharmacists from unreasonable, warrantless intrusions by federal and state regulatory personnel . . . . " Footnote 20 of the majority opinion. In my opinion, this reading stands the statutes on their heads. Section 21a-261 and 21 U.S.C. § 880 constitute the regulatory scheme that *reduces* the pharmacists' expectation of privacy for fourth amendment purposes. Admittedly, those statutes contain restrictions on the authority to inspect that are dictated by the fourth amendment, but, in the absence of the statutes, the fourth amendment would prohibit *any* intrusion by the government without a warrant or the consent of the pharmacists. On the other hand, in my view, the only purpose of § 21a-265 is to protect pharmacists and other persons with privacy interests in pharmacy records from the unwarranted disclosure of the records to unauthorized persons.

obtaining prescriptions from more than one doctor, or to prevent doctors from over-prescribing . . . ." *Id.*, at 592, 97 S.Ct. 869. The law was challenged by a group of patients regularly receiving prescriptions for Schedule II drugs, which include opium and opium derivatives, cocaine, methadone, amphetamines and methaqualone, by doctors who prescribed such drugs and by two associations of physicians. *Id.*, at 593 n. 8, 595, 97 S.Ct. 869. They claimed that the [sic] "the statute threaten[ed] to impair their interest in the nondisclosure of private information" in violation of the fourteenth amendment. *Id.*, at 600, 97 S.Ct. 869.

The court noted that "[t]he concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion . . . . The first of [these] facets . . . is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interests referred to in [this opinion]." (Citation omitted; internal quotation marks omitted.) *Id.*, at 599 n. 24, 97 S.Ct. 869.

The court also explicitly rejected the appellees' claim, based on language in *Terry v. Ohio,* 392 U.S. 1, 9, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L. Ed.2d 576 (1967), "that a constitutional privacy right emanates from the Fourth Amendment . . . ." (Citations omitted.) *Whalen*

*v. Roe, supra*, 429 U.S. at 604 n. 32, 97 S.Ct. 869. The court concluded that "those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now." *Id.* In other words, where there is no government surveillance and intrusion for criminal law enforcement purposes, the mere disclosure of personal information does not constitute an invasion of privacy under the fourth amendment.

Thus, the court in *Whalen* explicitly distinguished fourth amendment privacy interests from fourteenth amendment privacy interests and made it clear that there was no colorable fourth amendment claim in that case. *Id.* The court did recognize, however, that the government typically has a duty to avoid unwarranted disclosure of personal information in government files and that that duty "arguably has its roots in the Constitution . . . ." *Id.*, at 605, 97 S.Ct. 869. The court concluded that, because the New York statute adequately protected the confidentiality of the records; *id.*; the "record [did] not establish an invasion of any right or liberty protected by the Fourteenth Amendment." *Id.*, at 606, 97 S.Ct. 869.

The majority concludes that, under *Whalen,* because state and federal regulatory agents have access to the defendant's pharmacy records under their respective regulatory inspection schemes, he has no privacy interest in those records vis-a-vis criminal law enforcement officials. *See* footnote 39 of the majority opinion. In my view, however, the majority ignores the language in *Whalen* limiting the holding of that case to fourteenth amendment

privacy interests. It also ignores the United States Supreme Court cases decided under the special needs doctrine that have developed and clarified the distinction, merely referred to in *Whalen,* between the privacy interest in nondisclosure of personal information and the privacy interest in being free from government surveillance and intrusion.

In special needs cases, the question is whether a warrantless and suspicionless search is nevertheless reasonable under the fourth amendment because "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." (Internal quotation marks omitted.) *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In *Skinner,* the court considered the constitutionality of a regulation providing for the suspicionless and warrantless toxicological testing of railway workers. The court concluded that such testing was justified and did not violate the fourth amendment when the purpose was "not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" *Id.*, at 620-21, 109 S.Ct. 1402. The court noted, however, that the regulation under review provided in part that "[e]ach sample provided under [Subpart C] is retained for not less than six months following the date of the accident or incident and may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian . . . ." (Internal quotation marks omitted.) *Id.*, at 621 n. 5, 109 S.Ct. 1402. The court further noted that "[w]hile this provision might be read broadly to authorize the release of biological samples to law enforcement authorities, the

record does not disclose that it was intended to be, or actually has been, so used. Indeed, while respondents aver generally that test results might be made available to law enforcement authorities . . . they do not seriously contend that this provision, or any other part of the administrative scheme, was designed as 'a "pretext" to enable law enforcement authorities to gather evidence of penal law violations.' *New York v. Burger,* 482 U.S. 691, [716-17 n. 27, 107 S.Ct. 2636, 96 L.Ed.2d 601] (1987). Absent a persuasive showing that the [Federal Railroad Administration's] testing program is pretextual, we assess the . . . scheme in light of its obvious administrative purpose. We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the [Federal Railroad Administration's] program." *Skinner v. Railway Labor Executives' Assn., supra,* at 621 n.5, 109 S.Ct. 1402. Thus, the court in *Skinner* clearly recognized that the purpose of a search may be constitutionally significant.

In *Vernonia School District 47J v. Acton,* 515 U.S. 646, 650-51, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), the United States Supreme Court considered the constitutionality of a school policy under which students who wished to play sports were required, under monitored conditions, to provide urine samples that were then tested for drugs. The court recognized that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant . . . ." (Citation omitted.) *Id.,* at 653, 115 S.Ct. 2386. It also criticized the dissenting opinion in that case for "lump

[ing] this search together with 'evidentiary' searches, which generally require probable cause"; *id.*, at 658-59 n. 2, 115 S.Ct. 2386; and emphasized that "the search here is undertaken for prophylactic and distinctly *non* punitive purposes . . . ." (Citations omitted; emphasis in original.) *Id.*, at 658 n. 2, 115 S.Ct. 2386. Thus the court again clearly suggested that the purpose of the search is constitutionally significant. The court concluded that the government interest in protecting high school athletes from adverse effects of drug use and ensuring a drug-free school justified the warrantless drug tests. *Id.*, at 664-65, 115 S.Ct. 2386.

In *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 660, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), the court considered the constitutionality of a program promulgated by the United States Customs Service that required drug testing of employees who applied for or occupied certain positions within the service. The court noted that "[i]t is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent." *Id.*, at 666, 109 S.Ct. 1384. It concluded that the government's interest in ensuring the physical health and unimpeachable integrity and judgment of customs agents involved in interdiction of drug traffic justified the warrantless searches. *Id.*, at 670, 109 S.Ct. 1384; *see* also *Griffin v. Wisconsin,* 483 U.S. 868, 875, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (warrantless search of probationer's home is justified by purposes of probation, i.e., rehabilitation of probationer and protection of public); *New Jersey v. T.L.O.,* 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (need to maintain order in schools

justifies warrantless search of student on less than probable cause standard); *Bell v. Wolfish,* 441 U.S. 520, 558-60, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (need for prison security justifies warrantless strip search of prisoners).

I note that in *National Treasury Employees Union* the customs service itself, like Connecticut's department of consumer protection and the federal drug enforcement agency, which are charged with administering the inspection schemes at issue in this case, had criminal law enforcement authority. *See National Treasury Employees Union v. Von Raab, supra,* 489 U.S. at 659-60, 109 S.Ct. 1384. Accordingly, the same persons who had authority to view the drug test results had authority to enforce the drug laws. The United States Supreme Court found it constitutionally significant, however, that the test results could not be used for criminal law enforcement purposes without the employee's consent. *Id.*, at 666, 109 S.Ct. 1384. Thus, even though it is clear that the employees had no protectible fourteenth amendment privacy interest in the test results vis-a-vis the service, the court clearly suggested that the employees retained a fourth amendment privacy interest in that information.

In the United States Supreme Court's recent decision in *Ferguson v. Charleston,* 532 U.S. 67, 121 S.Ct. 1281, 1284, 149 L.Ed.2d 205 (2001), the court considered "whether the [state's] interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." A task force consisting of representatives of a university hospital, the police, a local substance abuse commission and the state's department of

social services had adopted a policy concerning the management of drug abuse during pregnancy. *Id.* at 70, 121 S.Ct. 1281. Under the policy, a pregnant patient was to be tested for cocaine use if she met one of nine specified criteria. *Id.* The policy also provided that patients who tested positive would be referred to a substance abuse clinic. *Id.* If the patient tested positive a second time, the police were to be notified, and the patient arrested. *Id.* at 89-91, 121 S.Ct. 1281.

Ten women who had been arrested after testing positive for cocaine use challenged the policy, claiming that the warrantless and nonconsensual drug tests were unconstitutional searches. *Id.* at 73-74, 121 S.Ct. 1281. The respondent task force members claimed that the petitioners had consented to the searches and that, as a matter of law, the searches were reasonable because they were justified by special purposes not related to law enforcement. The court did not resolve the respondents' claim that the patients had consented to the searches, because the issue had not been addressed by the Fourth Circuit Court of Appeals. *Id.* As to the respondents' claim that the searches were justified by "special non-law-enforcement purposes"; *id.*; the court recognized that, "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification." *Id.* at 76, n. 7, 121 S.Ct. 1281. It also recognized, however, that "[i]n . . . special needs cases, we have tolerated suspension of the Fourth Amendment's warrant or probable cause requirement in part because *there was no law enforcement purpose behind the searches in those cases, and there was*

*little, if any, entanglement with law enforcement.*" (Emphasis added.) *Id.* at 81, n. 15, 121 S.Ct. 1281. It concluded that "the purpose actually served by [these] searches is ultimately indistinguishable from the general interest in crime control." (Internal quotation marks omitted.) *Id.* at 81, 121 S.Ct. 1281. "While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of [the] policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose." (Emphasis in original.) *Id.* at 82-84, 121 S.Ct. 1281. The court concluded that the case "simply does not fit within the closely guarded category of 'special needs.'"[6] *Id.* at 83, 121 S.Ct. 1281; *see* also

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[6] The court also concluded that "[w]hile state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients,* they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require." (Emphasis in original.) *Ferguson v. Charleston, supra* at 84-86, 121 S.Ct. 1281. I assume that a hospital does not "inadvertently acquire" evidence of cocaine use when it deliberately administers a test for such use, and, accordingly, I interpret this statement to mean

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*Indianapolis v. Edmond,* 531 U.S. 32, 42-43, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) ("severe and intractable nature of the drug problem" did not justify establishment of vehicle checkpoints when purpose was general crime control). Thus, the court in *Ferguson* recognized that the special needs balancing test is not applicable in cases where the search is undertaken for general law enforcement purposes. *See Ferguson v. Charleston, supra* at 76, n. 7, 121 S.Ct. 1281 (recognizing that balancing test should be applied only in exceptional cases where special needs make obtaining warrant impracticable).

The majority concludes that, under *Whalen,* because a large number of government officials may look at the defendant's pharmacy records, he has no privacy interest

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that, if the hospital intends, either under a specific policy or in performance of its perceived civic duty, to inform the police if the results of the test are positive, it must obtain the prior consent of the patient. *See Vernonia School District 47J v. Acton, supra*, 515 U.S. at 650-51, 664-65, 115 S.Ct. 2386 (warrantless drug testing of athletes by school officials is reasonable under fourth amendment when test results are used only for school purposes and are not provided to law enforcement officials); *National Treasury Employees Union v. Von Raab, supra*, 489 U.S. at 666, 109 S.Ct. 1384 (warrantless drug testing of customs agents by customs agency is reasonable under fourth amendment when testing program is used for internal purposes and is not designed to serve ordinary needs of law enforcement). Furthermore, I interpret the court's statement that a patient has a reasonable privacy expectation that the results of diagnostic tests will not be disclosed to nonmedical personnel without the patient's consent; *Ferguson v. Charleston, supra*, at 84-85, 121 S.Ct. 1281 to mean that, under the fourth amendment, the police are not authorized to go on fishing expeditions into patients' records, even though, when a state hospital does "inadvertently acquire" evidence of a crime, e.g., evidence of child abuse acquired during treatment of a child's injuries or evidence of drug abuse acquired while treating a patient for an apparent drug overdose, it must preserve medical records pertaining to the crime and may have a duty to disclose that information to the police.

in those records vis-a-vis the government and, therefore, a government official's motive for looking at the records is irrelevant for purposes of determining whether a search has taken place. I simply do not see how that conclusion can be reconciled with the special needs cases. In *Skinner v. Railway Labor Executives' Assn., supra*, 489 U.S. at 621 n. 5, 109 S.Ct. 1402, the court explicitly stated that it was leaving to another day "the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the [Federal Railroad Administration's] program." In *Vernonia School District 47J v. Acton, supra*, 515 U.S. at 658 n. 2, 115 S.Ct. 2386, the court emphasized that the search under review in that case was reasonable because it was "undertaken for prophylactic and distinctly *non* punitive purposes . . . ." (Citations omitted; emphasis in original.) In *National Treasury Employees Union v. Von Raab, supra*, 489 U.S. at 666, 109 S.Ct. 1384, the drug test results were scrutinized by government officials with criminal law enforcement authority and the court found it constitutionally significant that the drug test results "may not be used in a criminal prosecution of the employee without the employee's consent." Finally, in *Ferguson v. Charleston, supra* at 81, 121 S.Ct. 1281, the court held that a government program the primary purpose of which was to generate evidence for law enforcement purposes was unconstitutional even when the ultimate purpose of the program was to improve public health.

In my view these cases clearly indicate that the government cannot collect for an administrative purpose sensitive personal information in which an individual would otherwise have a reasonable expectation of privacy

and then, claiming that the expectation of privacy has been vitiated because the information has been collected, use the information in a criminal investigation. I do not believe that if the government policies under review in *Skinner* and *Vernonia School District 47J* had provided that the drug test results routinely would be provided to the police, or if the drug testing program in *National Treasury Employees Union* had provided that the customs service could use the test results for general criminal law enforcement purposes without the consent of the employee, those policies would have been found to be constitutional. Nor do I believe that even if the primary purpose of the government program under review in *Ferguson* had been to identify babies needing special medical attention at birth, but the program had provided that the test results routinely would be provided to the police, such a policy would have been found to be constitutional. I cannot perceive any reason that the government's practice of obtaining such information for a criminal law enforcement purpose in the absence of specific regulatory authority should be treated any differently. Accordingly, I do not believe that such a practice is constitutional. In concluding in this case that it is,[6] the majority essentially has adopted the reasoning of the dissenting opinions in *Ferguson v.*

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[6] I recognize that the majority concludes that the searches are specifically authorized by § 21a-265 and focuses its analysis on whether that statute is constitutional. As I have already indicated, I disagree with that analysis. Because the majority believes, however, that the defendant forfeited any expectation of privacy in his pharmacy records vis-a-vis the government when it disclosed the information to the pharmacy, it presumably would conclude that the search of the defendant's records was constitutional even in the absence of § 21a-265.

*Charleston, supra* at 81, 121 S.Ct. 1281, (Scalia, J., dissenting) (arguing that existence of criminal law enforcement purpose cannot invalidate otherwise lawful search); and *Indianapolis v. Edmond, supra*, 531 U.S. at 52, 121 S.Ct. 447 (Rehnquist, C.J., dissenting) (arguing that subjective intent of person performing search is irrelevant and that "[i]t is the objective effect of the State's actions on the privacy of the individual that animates the Fourth Amendment").

I recognize that the special needs cases, unlike this case, involve intrusions into a person's body or home. In my view, however, that distinction is not significant. As recognized by the United States Supreme Court in *Katz v. United States, supra*, 389 U.S. at 353, 88 S.Ct. 507, "the Fourth Amendment protects people – and not simply 'areas' . . . . " *Id.* (rejecting view that fourth amendment applies only to intrusion into given enclosure and seizure of tangible items and concluding that it applies to words spoken in public telephone booth). Furthermore, I do not see why the government should be able to do in two or three or four steps what it cannot do in one. If the government cannot collect private materials or information without obtaining a warrant if it intends to use the information for a criminal law enforcement purpose, it cannot compel private entities to collect such information and then obtain it from the private entities and use it for such a purpose.

In short, I believe that an individual's fourth amendment interest in being free from governmental surveillance and intrusion for criminal law enforcement purposes is, as recognized by the court in *Whalen v. Roe, supra*, 429 U.S. at 599 n. 24, 97 S.Ct. 869, distinct from and, in cases where the government has compelled the disclosure for a

legitimate regulatory purpose, broader than the fourteenth amendment privacy interest in being free from the disclosure of sensitive personal information. *See* also *Katz v. United States, supra*, 389 U.S. at 350, 88 S.Ct. 507 ("[the Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all"). This is especially so in cases, like this one, where the records are not required to be kept in a format that reveals information about specific individuals and, consequently, where there has not necessarily been any prior invasion of an individual's fourteenth amendment privacy interest.[7] Although the government has a legitimate interest in regulating the distribution of Schedule II drugs by pharmacies and physicians that justifies the regulatory

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[7] In particular, I note the intangible and divisible nature of the information contained in prescriptions and the nature of the information storage systems used by the pharmacies. The use of an automated data processing system for the storage and retrieval of prescription information allows the pharmacy to produce the information in a variety of formats, not all of which are required by statute, not all of which are calculated to facilitate enforcement of the regulatory scheme, and not all of which reveal information about particular consumers. For example, the state has pointed to nothing in the governing statutes or regulations that specifically requires the pharmacy to maintain patient profiles, and it has not articulated any regulatory reason for Brown to have obtained the profiles in this case. Rather, it would appear that these profiles are maintained for the convenience of the patient and his physician. Furthermore, I note that an individual's potential privacy interest is implicated only if the information is disclosed in a format that reveals information about him personally, not, for example, when it appears anonymously in a record indicating how much of a particular controlled substance a pharmacy distributed in a particular month. I cannot conclude that, by assuming the risk that his prescription information would be used to further the regulatory scheme, the defendant assumed the risk that the government would inspect his patient profiles without a warrant.

inspection scheme, that interest does not require that the government have access to records designed to reveal information about individual consumers, and it would not be undermined by requiring probable cause and a warrant before criminal law enforcement officials are allowed to search such records. Accordingly, I would conclude that the fourth amendment requires probable cause and a search warrant to search an individual's pharmacy records.

Finally, I note that, under the majority's decision in this case, individuals will have even less protection from egregious government conduct than the pervasively regulated pharmacies. The state can now conduct a flagrantly illegal inspection of pharmacy records and use any materials seized in a criminal prosecution of an individual, even though it could not use the information in proceedings against the pharmacy, because the conduct simply will not constitute a search as to the individual. This point was made very clearly in *United States v. Payner,* 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980). In that case, the government engaged in egregious conduct that the United States Supreme Court characterized as "unconstitutional and possibly criminal," in order to obtain evidence against the defendant. *Id.*, at 733, 100 S.Ct. 2439. Nevertheless, the court held that, because evidence had been in possession of a third party, the defendant had no expectation of privacy in the materials seized and he had no protectible fourth amendment interest. *Id.*, at 731-32, 100 S.Ct. 2439. Therefore, the court held that the exclusionary rule did not apply. *Id.*, at 734, 100 S.Ct. 2439. In my view, the special needs cases clearly indicate that this principle does not apply when the government has compelled the disclosure of the object of the search in the first instance.

I would conclude that the defendant's pharmacy records were properly suppressed as having been obtained in the course of a warrantless search unsupported by any recognized exception to the warrant requirement. Accordingly, I dissent.

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| NO. CR97-5154140 | : | SUPERIOR COURT |
| STATE OF CONNECTICUT | : | NEW LONDON JUDICIAL DISTRICT AT NEW LONDON |
| VS. | : | |
| NICHOLAS RUSSO | : | AUGUST 15, 2000 |

**MEMORANDUM OF DECISION**

(Filed Aug. 15, 2000)

SCHIMELMAN

Defendant, Nicholas Russo is charged with multiple counts of fraudulently obtaining controlled substances in violation of C.G.S. § 21a-266(a)(1) and forgery in the second degree, C.G.S. § 53a-139.

Defendant seeks to suppress his prescription records obtained from pharmacies by an Inspector with the Federal Drug Enforcement Agency (DEA), without a search warrant, administrative warrant or subpoena at the request of the Hartford Police Department, by whom the defendant was employed as a detective.

At the suppression hearing, this court limited argument to the preliminary issue whether or not the defendant had the necessary expectation of privacy under either the United States or Connecticut Constitution to seek suppression of these documents and this Memorandum of Decision addresses only that issue.

To resolve this preliminary issue, the Court finds that on October 9, 1997, the defendant, Detective Nicholas Russo, Jr., became the subject of a criminal investigation conducted by the Hartford Police Department (HPD). At

the request of HPD Captain Jeffrey Flaherty, DEA Inspector Marcus Brown began an investigation of pharmacies located within Det. Russo's neighborhood. During this investigation, Inspector Brown requested each pharmacy turn over patient profiles held on Det. Russo, which consisted of his record of prescriptions. The parties have stipulated that Inspector Brown did not have a search warrant, administrative warrant or subpoena, but rather, without legal process, obtained these records.

Defendant moves to suppress the prescription information obtained from each pharmacy by Inspector Brown. Defendant challenges the admissibility of the evidence, claiming the records were obtained as the result of a warrantless criminal investigation, in violation of the Constitution of the United States, amendment four, and Constitution of Connecticut, article first, § 7.

The state contends that the defendant lacks the requisite standing to challenge the admissibility of these prescription records, since the records were not seized from him, but were obtained from third parties, namely the pharmacies. The state claims that the defendant does not possess a reasonable expectation of privacy in these records obtained from third parties.

Federal and state law both recognize and acknowledge adherence to the policy that the fourth amendment protects persons, not places, and is a right that cannot be raised vicariously, but must be pursued personally. *See Minnesota v. Carter,* 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998); *see* also *United States v. Salvucci,* 448 U.S. 83, 87, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, L.Ed. 387 (1978), reh'g denied 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83

(1979); *Katz v. United States,* 389 U.S. 347, 351, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Brosnan,* 24 Conn.App. 473, 478, 589 A.2d 1234 (1991), rev'd in part, aff'd. in part 21 Conn. 788, 608 A.2d 49 (1992). The person challenging the illegal search and seizure bears the burden of proving that he or she possessed a "reasonable expectation of privacy" in the thing or place searched. *State v. Pittman,* 209 Conn. 596, 601, 553 A.2d 155 (1989); *see State v. Bernier* 246 Conn. 63, 76 717 A.2d 652 (1998) (holding that "[t]he defendant bears the burden of proving that his privacy interests in the place searched are reasonable"); *see* generally *Minnesota v. Carter, supra* 525 U.S. 88 (discussing a defendant's ability to prove a Fourth Amendment violation); *see* also *Rawlings v. Kentucky,* 448 U.S. 98, 104, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

Under both the fourth amendment to the United States Constitution and article first, § 7 of the constitution of Connecticut, a search conducted without a warrant is per se unreasonable. *See Steagald v. United States,* 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *see* also *Katz v. United States, supra* 389 U.S. 357; *State v. Joyce,* 229 Conn. 10, 24-25, 639 A.2d 1007 (1994), cert. denied 523 U.S. 1077, 118 S.Ct. 1523, 140 L.Ed.2d 674 (1994). A defendant will not be permitted to challenge the unreasonableness of the warrantless search and seizure absent a showing that that particular defendant possessed: (1) a legitimate expectation of privacy; and (2) that expectation is deemed reasonable by society. *See Minnesota v. Carter, supra,* 525 U.S. 88; *see* also *State v.. Bernier, supra,* 246 Conn. 72; *State v. Hill,* 237 Conn. 81, 92, 675 A.2d 866 (1996); *State v. Joyce, supra,* 229 Conn. 20.

In 1978, the Supreme Court of the United States abolished the notion of "automatic standing" as it related

to federal fourth amendment search and seizure challenges. *See Rakas v. Illinois, supra,* 439 U.S. 138. Since that holding, the Court has repeatedly reaffirmed its decision and expressly held that a search and seizure challenge is best reviewed "within the purview of substantive fourth amendment law than within that of standing." *Rakas v. Illinois, supra,* 439 U.S. 140. Previously, "standing" to challenge a Fourth Amendment violation could be conferred upon an individual merely because he or she was the "target" of a search. *See id.* 136 (discussing target theory as allowing "those against whom the search was directed" to raise a Fourth Amendment challenge, regardless of the privacy interest the target possessed in the place searched).

The Court has consistently upheld its rejection of standing in favor of review under a substantive fourth amendment claim. *See United States v. Salvucci, supra,* 448 U.S. 87; *see* also *Minnesota v. Carter, supra,* 525 U.S. 88. Rather than analyzing a fourth amendment challenge under the traditional standing doctrine, which requires a party to allege an injury-in-fact and assert his or her own rights, the Court asks: "whether the challenged search and seizure violated the Fourth Amendment rights of the criminal defendant who seeks to exclude the evidence obtained during it." *Rakas v. Illinois, supra,* 439 U.S. 139-40.

The Supreme Court of Connecticut recognized that automatic standing no longer exists in the context of a federal constitutional challenge. *See State v. Maia,* 243 Conn. 242, 703 A.2d 98 (1997). However, the court has yet to answer the question of whether automatic standing exists when a criminal defendant raises a search and seizure challenge under article first, § 7 of the constitution

of Connecticut. *See id.* (noting that the question of automatic standing remains open in Connecticut).

The Supreme Court of Connecticut did find that "[t]he touchstone to determining whether a person has standing to contest an allegedly illegal search is whether that person has a reasonable expectation of privacy in the invaded place." *State v. Hill, supra,* 237 Conn. 92. The court proceeded to enumerate a two-part "subjective/objective" test that "must be satisfied" for a criminal defendant to prove that he or she possessed a "reasonable expectation of privacy." *Id.* Under the two-part test a criminal defendant must prove that: (1) he or she "manifested a subjective expectation of privacy" with the place or thing searched; and (2) the expectation is one that "society would consider reasonable." *Id.* 72.

In *State v. Mitchell,* 56 Conn.App. 561, 565-66, 744 A.2d 927 (2000), cert. denied, 253 Conn. 910 (2000), the Appellate Court of Connecticut interpreted the two-prong test set forth in Hill to be the test for determining standing under article first, § 7 of the constitution of Connecticut. The *Mitchell* court further found that this two-part test is "the same test as that under the United States constitution." *State v. Mitchell, supra,* 56 Conn.App. 566, citing *Minnesota v. Olson,* 495 U.S. 91, 95-96, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (holding that since *Katz,* the law requires (1) a legitimate expectation of privacy that (2) "society is prepared to recognize as reasonable") (Internal quotation marks omitted.)

The Appellate Court of Connecticut recently analyzed the Hill two-part subjective/objective test in *State v. Boyd,* 57 Conn.App. 176, 184, 749 A.2d 637 (2000), cert. denied, 253 Conn. 912 (2000). The court held that the "subjective

test does not rest on the absolute subjective perception of the individual defendant . . . but on finding conduct that has demonstrated an intention to keep activities or things private and free from knowing exposure . . . " *Id.,* 185. The court reiterated that to establish this subjective perception, the individual must have: (1) a personal relationship with the searched location; (2) a regular relationship with the searched location; and (3) "maintained the location and the items within it in a private manner at the time of the search." *Id.*

The Appellate Court also elaborated on the factors that may be taken into consideration in making the determination as to whether the individual's privacy interest is objectively reasonable within society. *Id.,* 188. The court stressed that the enumerated factors included, but were not limited to, such things as: ownership of the property; "use of the premises on a regular basis for professional, religious, or business purposes"; measures the individual employed to secure or insure privacy; and the individual's "subjective expectation that the premises would remain free from Government intrusion[.]" *State v. Boyd, supra,* 57 Conn.App. 188.

The relevant question here is whether Detective Russo possessed a legitimate expectation of privacy in prescription records maintained by the pharmacies he patronized. If this question is answered in the affirmative, the next question necessarily must be whether this expectation of privacy is an objectively reasonable expectation within society. An expectation of privacy is legitimate when it is "rooted in a generally accepted understanding that is recognized and permitted by society." *State v. Brosnan, supra,* 24 Conn.App. 479.

The review and determination of what constitutes an objectively reasonable expectation of privacy is performed on a "case-by-case" basis in Connecticut. *State v. Bernier, supra,* 246 Conn. 72. This determination requires a "fact-specific inquiry into all the relevant circumstances." *Id.; see State v. Pittman, supra,* 209 Conn. 600, positing that a determination of a reasonable expectation of privacy requires a full inquiry into the relevant facts). The fact specific inquiry investigates whether: (1) the official conduct constituted a search under the federal and state constitutions; and (2) it "infringe[d] an expectation of privacy that society is prepared to consider reasonable." *State v. Joyce, supra,* 229 Conn. 23-24.

"[A] person can have a legally sufficient interest in a place other than his own home so that the fourth amendment protects him from unreasonable governmental intrusions into that place." *Rakas v. Illinois, supra,* 439 U.S. 142. Criminal defendants have been permitted to raise a Fourth Amendment challenge to searches and seizures conducted against a third party when they have been able to "demonstrate ... a legitimate expectation of privacy attaching to the records obtained." *United States v. Plunk,* 153 F.3d 1011, 1020 (9th Cir.1998); cert. denied, 526 U.S. 1060, 119 S.Ct. 1376, 143 L.Ed.2d 535 (1999).

Courts have found that no reasonable expectation of privacy attaches to such things as telephone and bank records. *See id.;* see also *Smith v. Maryland,* 442 U.S. 735, 743, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (holding no subjective expectation of privacy attaches to phone numbers because numbers are voluntarily conveyed); *State v. Iasevoli,* 188 Conn. 325, 334, 449 A.2d 996 (1982) (holding that fourth amendment does not prohibit obtaining an individual's bank records from the third party bank); see

generally *In re Petition of State's Attorney, Cook County, IL,* 179 Conn. 102, 106, 425 A.2d 588 (1979) (holding that bank customer retains no right to contest subpoena issued to the bank for the customer's record).

While it is true that courts have often held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," exceptions do exist. *Smith v. Maryland, supra* 442 U.S. 743. An expectation of privacy has been held to attach to records regarding an individual's health, regardless of whether those records are maintained by and obtained from a third party. *See* generally *Doe v. City of New York,* 15 F .3d 264, 267 (2d Cir.1994) (holding that information regarding an individual's health is protected under an individual's right to privacy). The right to privacy regarding the status of an individual's health stems from the fact that "there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over." *Doe v. City of New York, supra* 15 F.3d 267; *see* also *Powell v. Schriver,* 175 F.3d 107, 111 (2d Cir.1999).

Whether an individual maintains a privacy interest in his or her personal prescription records is a question that several courts have considered. The Supreme Court of the United States held that a privacy interest attaches to prescription records through an individual's "interest in avoiding disclosure of personal matters." *Whalen v. Roe,* 429 U.S. 589, 599, 97 S.Ct. 869, 51 L. Ed.2d 64 (1977). The Ninth Circuit Court of Appeals recently reiterated this holding in its finding that the subject of seized prescription records possesses the requisite standing to raise a fourth amendment challenge to the seizure of prescription records from a third party in the course of a criminal

investigation. *See Murphy v. Townsend,* 187 F.3d 648, 1999 WL 439468 1-2 (9th Cir.1999).

In *State v. DeFusco,* 224 Conn. 627 (1993), our Supreme Court noted in a footnote: "We are sensitive to the reality that, in our complex society, some Connecticut residents may legally generate garbage that reveals highly personal information. Medical information or products, financial documents and personal letters are among those items that we think it reasonable for Connecticut residents to wish to maintain as confidential . . . " fn. 19.

Though the prescription records were seized from the pharmacies and not the defendant personally, the Court finds he may assert a violation of his federal and state constitutional rights. Prescriptions are issued by doctors and generally pertain to and provide insight into an individual's health, be it psychological or physical. Connecticut General Statutes § 38a-976 specifically classifies information obtained from pharmacists or pharmacies as medical records under the Connecticut Insurance Record and Privacy Protection Act. General Statutes § 38a-976(r). As such, prescription records fall within the purview of the right of confidentiality, and thus, the right of privacy, for all individuals.

Because information that may be obtained from a pharmacy or a pharmacist is classified as medical records, the defendant has a legitimate expectation that his prescription records will remain confidential. There is a legitimate expectation of privacy when an individual brings a prescription to a pharmacy to be filled because that prescription pertains to that person's physical and mental health. The defendant meets the subjective expectation standards set forth in *State v. Boyd, supra,* 57

Conn.App. 185. Further, as a detective who often worked in conjunction with federal agents, Detective Russo, more than an ordinary citizen, would have maintained a belief that his prescription records would remain private pursuant to the Connecticut General Statutes and the mandates of 21 U.S.C. § 880, authorizing administrative searches only.

This is an expectation that is objectively reasonable as prescriptions pertain to health, and an individual's health is a matter over "which one would prefer to maintain greater control." *Doe v. City of New York, supra,* 15 F.3d 267. Again, the non-exhaustive *Boyd* factors are met here. *See State v. Boyd, supra,* 57 Conn.App. 188. Detective Russo would have possessed a "subjective expectation that the [pharmacies] would remain free from government intrusion" because of the protections afforded all citizens by the Connecticut General Statutes and the United States Code, as they relate to privacy and to obtaining medical records.

For the above reasons, the defendant is found to possess the requisite expectation of privacy (standing) necessary to assert a challenge to the admissibility of his prescription records, regardless of the fact that the records were obtained from a third party.

In view of this preliminary ruling, further proceedings will be necessary prior to a substantive decision on the defendant's motion to suppress.

**SUPREME COURT**

**STATE OF CONNECTICUT**

**NO. SC 16430**

**STATE OF CONNECTICUT**

**v.**

**NICHOLAS RUSSO** : **MARCH 28, 2002**

**ORDER**

THE MOTION OF THE DEFENDANT, FILED FEBRUARY 19, 2002, FOR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED **DENIED**.

NARCOTT, J., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION

BY THE COURT,
/s/ Francis J. Drummond
CHIEF CLERK

NOTICE SENT: MARCH 28, 2002
JAMES S. BREWER
JOHN T. FORREST
PHILIP D. TEGELER
KEVIN T. KANE, STATE'S ATTORNEY
JACOBS, GRUDBERG, BELT & DOW, P.C.
CLERK, NEW LONDON J.D. (CR97-515414OT)
HON. STUART M. SCHIMELMAN
REPORTER OF JUDICIAL DECISIONS

21 U.S.C.A. § 880

§ 880. Administrative inspections and warrants

(a) "Controlled premises" defined

As used in this section, the term "controlled premises" means –

**(1)** places where original or other records or documents required under this subchapter are kept or required to be kept, and

**(2)** places, including factories, warehouses, and other establishments, and conveyances, where persons registered under section 823 of this title (or exempt from registration under section 822(d) of this title or by regulation of the Attorney General) or regulated persons may lawfully hold, manufacture, distribute, dispense, administer, or otherwise dispose of controlled substances or listed chemicals or where records relating to those activities are maintained.

(b) Grant of authority; scope of inspections

**(1)** For the purpose of inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept or made under this subchapter and otherwise facilitating the carrying out of his functions under this subchapter, the Attorney General is authorized, in accordance with this section, to enter controlled premises and to conduct administrative inspections thereof, and of the things specified in this section, relevant to those functions.

**(2)** Such entries and inspections shall be carried out through officers or employees (hereinafter referred to as

"inspectors") designated by the Attorney General. Any such inspector, upon stating his purpose and presenting to the owner, operator, or agent in charge of such premises (A) appropriate credentials and (B) a written notice of his inspection authority (which notice in the case of an inspection requiring, or in fact supported by, an administrative inspection warrant shall consist of such warrant), shall have the right to enter such premises and conduct such inspection at reasonable times.

**(3)** Except as may otherwise be indicated in an applicable inspection warrant, the inspector shall have the right –

**(A)** to inspect and copy records, reports, and other documents required to be kept or made under this subchapter;

**(B)** to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished drugs, listed chemicals, and other substances or materials, containers, and labeling found therein, and, except as provided in paragraph (4) of this subsection, all other things therein (including records, files, papers, processes, controls, and facilities) appropriate for verification of the records, reports, and documents referred to in clause (A) or otherwise bearing on the provisions of this subchapter; and

**(C)** to inventory any stock of any controlled substance or listed chemical therein and obtain samples of any such substance or chemical.

**(4)** Except when the owner, operator, or agent in charge of the controlled premises so consents in writing, no inspection authorized by this section shall extend to –

**(A)** financial data;

**(B)** sales data other than shipment data; or

**(C)** pricing data.

(c) Situations not requiring warrants

A warrant under this section shall not be required for the inspection of books and records pursuant to an administrative subpena issued in accordance with section 876 of this title, nor for entries and administrative inspections (including seizures of property) –

**(1)** with the consent of the owner, operator, or agent in charge of the controlled premises;

**(2)** in situations presenting imminent danger to health or safety;

**(3)** in situations involving inspection of conveyances where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

**(4)** in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

**(5)** in any other situations where a warrant is not constitutionally required.

(d) Administrative inspection warrants; issuance; execution; probable cause

Issuance and execution of administrative inspection warrants shall be as follows:

(1) Any judge of the United States or of a State court of record, or any United States magistrate judge, may, within his territorial jurisdiction, and upon proper oath or affirmation showing probable cause, issue warrants for the purpose of conducting administrative inspections authorized by this subchapter or regulations thereunder, and seizures of property appropriate to such inspections. For the purposes of this section, the term "probable cause" means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant.

(2) A warrant shall issue only upon an affidavit of an officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate judge and establishing the grounds for issuing the warrant. If the judge or magistrate judge is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of such inspection, and, where appropriate, the type of property to be inspected, if any. The warrant shall identify the items or types of property to be seized, if any. The warrant shall be directed to a person authorized under subsection (b)(2) of this section to execute it. The warrant shall state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof. It shall command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified, and, where appropriate, shall direct the seizure of the property specified. The warrant shall direct that it be served during

normal business hours. It shall designate the judge or magistrate judge to whom it shall be returned.

(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate judge allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate judge, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and the applicant for the warrant.

(4) The judge or magistrate judge who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made

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21 C.F.R. § 1316.01

§ 1316.01 Scope of Subpart A.

Procedures regarding administrative inspections and warrants pursuant to sections 302(f), 510, 1008(d), and 1015 of the Act (21 U.S.C. 822(f), 880, 958(d), and 965) are governed generally by those sections and specifically by the sections of this subpart.

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21 C.F.R. § 1316.02

§ 1316.02 Definitions.

As used in this subpart, the following terms shall have the meanings specified:

(a) The term "Act" means the Controlled Substances Act (84 Stat. 1242; 21 U.S.C. 801) and/or the Controlled Substances Import and Export Act (84 Stat. 1285; 21 U.S.C. 951).

(b) The term "Administration" means the Drug Enforcement Administration.

(c) The term "controlled premises" means –

(1) Places where original or other records or documents required under the Act are kept or required to be kept, and

(2) Places, including factories, warehouses, or other establishments and conveyances, where persons registered under the Act or exempted from registration under the Act, or regulated persons may lawfully hold, manufacture, or distribute, dispense, administer, or otherwise dispose of controlled substances or listed chemicals or where records relating to those activities are maintained.

(d) The term "Administrator" means the Administrator of the Administration. The Administrator has been delegated authority under the Act by the Attorney General (28 CFR 0.100).

(e) The term "inspector" means an officer or employee of the Administration authorized by the Administrator to make inspections under the Act.

(f) The term "register" and "registration" refer to registration required and permitted by sections 303 and 1008 of the Act (21 U.S.C. 823 and 958).

(g) Any term not defined in this part shall have the definition set forth in section 102 of the Act (21 U.S.C. 802) or part 1300 of this chapter.

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21 C.F.R. § 1316.03

§ 1316.03 Authority to make inspections.

In carrying out his functions under the Act, the Administrator, through his inspectors, is authorized in accordance with sections 510 and 1015 of the Act (21 U.S.C. 880 and 965) to enter controlled premises and conduct administrative inspections thereof, for the purpose of:

(a) Inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept or made under the Act and regulations promulgated under the Act, including, but not limited to, inventory and other records required to be kept pursuant to part 1304 of this chapter, order form records required to be kept pursuant to part 1305 of this chapter, prescription and distribution records required to be kept pursuant to part 1306 of this

chapter, records of listed chemicals, tableting machines, and encapsulating machines required to be kept pursuant to part 1310 of this chapter, import/export records of listed chemicals required to be kept pursuant to part 1313 of this chapter, shipping records identifying the name of each carrier used and the date and quantity of each shipment, and storage records identifying the name of each warehouse used and the date and quantity of each storage;

(b) Inspecting within reasonable limits and to a reasonable manner all pertinent equipment, finished and unfinished controlled substances, listed chemicals, and other substances or materials, containers, and labeling found at the controlled premises relating to this Act;

(c) Making a physical inventory of all controlled substances and listed chemicals on-hand at the premises;

(d) Collecting samples of controlled substances or listed chemicals (in the event any samples are collected during an inspection, the inspector shall issue a receipt for such samples on DEA Form 84 to the owner, operator, or agent in charge of the premises);

(e) Checking of records and information on distribution of controlled substances or listed chemicals by the registrant or regulated person (i.e., has the distribution of controlled substances or listed chemicals increased markedly within the past year, and if so why);

(f) Except as provided in Sec. 1316.04, all other things therein (including records, files, papers, processes, controls and facilities) appropriate for verification of the records, reports, documents referred to above or otherwise bearing on the provisions of the Act and the regulations thereunder.

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21 C.F.R. § 1316.04

§ 1316.04 Exclusion from inspection.

(a) Unless the owner, operator or agent in charge of the controlled premises so consents in writing, no inspection authorized by these regulations shall extend to:

(1) Financial data;

(2) Sales data other than shipping data; or

(3) Pricing data.

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21 C.F.R. § 1316.05

§ 1316.05 Entry.

An inspection shall be carried out by an inspector. Any such inspector, upon (a) stating his purpose and (b) presenting to the owner, operator or agent in charge of the premises to be inspected (1) appropriate credentials, and (2) written notice of his inspection authority under Sec. 1316.06 of this chapter, and (c) receiving informed consent under Sec. 1316.08 or through the use of administrative warrant issued under Secs. 1316.09-1316.13, shall have the right to enter such premises and conduct inspections at reasonable times and in a reasonable manner.

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21 C.F.R. § 1316.06

§ 1316.06 Notice of inspection.

The notice of inspection (DEA (or DNB) Form 82) shall contain:

(a) The name and title of the owner, operator, or agent in charge of the controlled premises;

(b) The controlled premises name;

(c) The address of the controlled premises to be inspected;

(d) The date and time of the inspection;

(e) A statement that a notice of inspection is given pursuant to section 510 of the Act (21 U.S.C. 880);

(f) A reproduction of the pertinent parts of section 510 of the Act; and

(g) The signature of the inspector.

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21 C.F.R. § 1316.07

§ 1316.07 Requirement for administrative inspection warrant; exceptions.

In all cases where an inspection is contemplated, an administrative inspection warrant is required pursuant to section 510 of the Act (21 U.S.C. 880), except that such warrant shall not be required for establishments applying for initial registration under the Act, for the inspection of books and records pursuant to an administrative subpoena issued in accordance with section 506 of the Act (21 U.S.C. 876) nor for entries in administrative inspections (including seizures of property):

(a) With the consent of the owner, operator, or agent in charge of the controlled premises as set forth in § 1316.08;

(b) In situations presenting imminent danger to health or safety;

(c) In situations involving inspection of conveyances where there is reasonable cause to obtain a warrant;

(d) In any other exceptional or emergency circumstance or time or opportunity to apply for a warrant is lacking; or

(e) In any other situations where a warrant is not constitutionally required.

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21 C.F.R. § 1316.08

§ 1316.08 Consent to inspection.

(a) An administrative inspection warrant shall not be required if informed consent is obtained from the owner, operator, or agent in charge of the controlled premises to be inspected.

(b) Wherever possible, informed consent shall consist of a written statement signed by the owner, operator, or agent in charge of the premises to be inspected and witnessed by two persons. The written consent shall contain the following information:

(1) That he (the owner, operator, or agent in charge of the premises) has been informed of his constitutional right not to have an administrative inspection made without an administrative inspection warrant;

(2) That he has right to refuse to consent to such an inspection;

(3) That anything of an incriminating nature which may be found may be seized and used against him in a criminal prosecution;

(4) That he has been presented with a notice of inspection as set forth in § 1316.06;

(5) That the consent is given by him is voluntary and without threats of any kind; and

(6) That he may withdraw his consent at any time during the course of inspection.

(c) The written consent shall be produced in duplicate and be distributed as follows:

(1) The original will be retained by the inspector; and

(2) The duplicate will be given to the person inspected.

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21 C.F.R. § 1316.09

§ 1316.09 Application for administrative inspection warrant.

(a) An administrative inspection warrant application shall be submitted to any judge of the United States or of a State court of record, or any United States magistrate and shall contain the following information:

(1) The name and address of the controlled premises to be inspected;

(2) A statement of statutory authority for the administrative inspection warrant, and that the fact that the particular inspection in question is designed to insure

compliance with the Act and the regulations promulgated thereunder;

(3) A statement relating to the nature and extent of the administrative inspection, including, where necessary, a request to seize specified items and/or to collect samples of finished or unfinished controlled substances or listed chemicals;

(4) A statement that the establishment either:

(i) Has not been previously inspected, or

(ii) Was last inspected on a particular date.

(b) The application shall be submitted under oath to an appropriate judge or magistrate.

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21 C.F.R. § 1316.10

§ 1316.10 Administrative probable cause.

If the judge or magistrate is satisfied that "administrative probable cause," as defined in section 510(d)(1) of the Act (21 U.S.C. 880(d)(1)) exists, he shall issue an administrative warrant. Administrative probable cause shall not mean criminal probable cause as defined by Federal statute or case law.

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21 C.F.R. § 1316.11

§ 1316.11 Execution of warrants.

An administrative inspection warrant shall be executed and returned as required by, and any inventory or

seizure made shall comply with the requirements of, section 510(d)(3) of the Act (21 U.S.C. 880(d)(3)). The inspection shall begin as soon as is practicable after the issuance of the administrative inspection warrant and shall be completed with reasonable promptness. The inspection shall be conducted during regular business hours and shall be completed in a reasonable manner.

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21 C.F.R. § 1316.12

§ 1316.12 Refusal to allow inspection with an administrative warrant.

If a registrant or any person subject to the Act refuses to permit execution of an administrative warrant or impedes the inspector in the execution of that warrant, he shall be advised that such refusal or action constitutes a violation of section 402(a)(6) of the Act (21 U.S.C. 842(a)(6)). If he persists and the circumstances warrant, he shall be arrested and the inspection shall commence or continue.

[62 FR 13970, March 24, 1997]

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21 C.F.R. § 1316.13

§ 1316.13 Frequency of administrative inspections.

Except where circumstances otherwise dictate, it is the intent of the Administration to inspect all manufacturers of controlled substances listed in Schedules I and II and distributors of controlled substances listed in Schedule I once each year. Distributors of controlled substances listed in Schedules II through V and manufacturers of controlled substances listed in Schedules III through V shall be

inspected as circumstances may require, based in part on the registrant's history of compliance with the requirements of this chapter and maintenance of effective controls and procedures to guard against the diversion of controlled substances.

[62 FR 13969, March 24, 1997]

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C.G.S.A. § 1-210

§ 1-210. Access to public records. Exempt records

(a) Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to inspect such records promptly during regular office or business hours or to receive a copy of such records in accordance with the provisions of section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. Each such agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such agency shall be kept in the office of the clerk of the political subdivision in which such public agency is located or of the Secretary of the State, as the case may be. Any certified record hereunder attested as a true copy by the clerk, chief or deputy of such agency or by such other person designated or empowered by law to so act, shall be competent evidence in any court of this state of the facts

contained therein. Each such agency shall make, keep and maintain a record of the proceedings of its meetings.

(b) Nothing in the Freedom of Information Act[1] shall be construed to require disclosure of:

(1) Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure;

(2) Personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy;

(3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) signed statements of witnesses, (C) information to be used in a prospective law enforcement action if prejudicial to such action, (D) investigatory techniques not otherwise known to the general public, (E) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (F) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or

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[1] C.G.S.A. § 1-200 et seq.

impairing of morals under section 53-21, or of an attempt thereof, or (G) uncorroborated allegations subject to destruction pursuant to section 1-216;

(4) Records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled;

(5) (A) Trade secrets, which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, or customer lists that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy; and

(B) Commercial or financial information given in confidence, not required by statute;

(6) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examinations;

(7) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all proceedings or transactions have been terminated or abandoned, provided the law of eminent domain shall not be affected by this provision;

(8) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish the applicant's personal qualification for the license, certificate or permit applied for;

(9) Records, reports and statements of strategy or negotiations with respect to collective bargaining;

(10) Records, tax returns, reports and statements exempted by federal law or state statutes or communications privileged by the attorney-client relationship;

(11) Names or addresses of students enrolled in any public school or college without the consent of each student whose name or address is to be disclosed who is eighteen years of age or older and a parent or guardian of each such student who is younger than eighteen years of age, provided this subdivision shall not be construed as prohibiting the disclosure of the names and addresses of students enrolled in any public school in a regional school district to the board of selectmen or town board of finance, as the case may be, of the town wherein the student resides for the purpose of verifying tuition payments made to such school;

(12) any information obtained by the use of illegal means;

(13) Records of an investigation or the name of an employee providing information under the provisions of section 4-61dd;

(14) Adoption records and information provided for in sections 45a-746, 45a-750 and 45a-751;

(15) Any page of a primary petition, nominating petition, referendum petition or petition for a town meeting submitted under any provision of the general statutes or of any special act, municipal charter or ordinance, until the required processing and certification of such page has been completed by the official or officials charged with such duty after which time disclosure of such page shall be required;

(16) Records of complaints, including information compiled in the investigation thereof, brought to a municipal health authority pursuant to chapter 368e[2] or a district department of health pursuant to chapter 368f,[3] until such time as the investigation is concluded or thirty days from the date of receipt of the complaint, whichever occurs first;

(17) Educational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232g;

(18) Records, the disclosure of which the Commissioner of Correction, or as it applies to Whiting Forensic Division facilities of the Connecticut Valley Hospital, the Commissioner of Mental Health and Addiction Services, has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction or Whiting Forensic Division facilities. Such records shall include, but are not limited to:

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[2] C.G.S.A. § 19a-200 et seq.

[3] C.G.S.A. § 19a-240 et seq.

(A) Security manuals, including emergency plans contained or referred to in such security manuals;

(B) Engineering and architectural drawings of correctional institutions or facilities or Whiting Forensic Division facilities;

(C) Operational specifications of security systems utilized by the Department of Correction at any correctional institution or facility, or Whiting Forensic Division facilities except that a general description of any such security system and the cost and quality of such system may be disclosed;

(D) Training manuals prepared for correctional institutions and facilities or Whiting Forensic Division facilities that describe, in any manner, security procedures, emergency plans or security equipment;

(E) Internal security audits of correctional institutions and facilities or Whiting Forensic Division facilities;

(F) Minutes or recordings of staff meetings of the Department of Correction or Whiting Forensic Division facilities, or portions of such minutes or recordings, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision;

(G) Logs or other documents that contain information on the movement or assignment of inmates or staff at correctional institutions or facilities; and

(H) Records that contain information on contacts between inmates, as defined in section 18-84, and law enforcement officers;

<Text of subdivision (b)(19) as amended by 2000, June Sp.Sess., P.A. 00-01, § 20, effective June 21, 2000.>

(19) Records, the disclosure of which the Commissioner of Public Works or, in the case of records concerning Judicial Department facilities, the Chief Court Administrator, has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person, any state-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility. Such records shall include, but are not limited to:

(A) Security manuals or reports, including emergency plans contained or referred to in such security manuals;

(B) Engineering and architectural drawings of state-owned or leased institutions or facilities;

(C) Operational specifications of security systems utilized at any state-owned or leased institution or facility, except that a general description of any such security system and the cost and quality of such system, may be disclosed;

(D) Training manuals prepared for state-owned or leased institutions or facilities that describe, in any manner, security procedures, emergency plans or security equipment;

(E) Internal security audits of state-owned or leased institutions or facilities;

(F) Minutes or recordings of meetings of the Department of Public Works or the Judicial Department, or portions of such minutes or recordings, that contain or

reveal information relating to security or other records otherwise exempt from disclosure under this subdivision; and

(G) Logs or other documents that contain information on the movement or assignment of security personnel at state-owned or leased institutions or facilities.

<Text of subdivision (b)(19) as added by 2000, P.A. 00-134, § 1, effective October 1, 2000.>

(19) Records of standards, procedures, processes, software and codes, not otherwise available to the public, the disclosure of which would compromise the security or integrity of an information technology system.

(c) Whenever a public agency receives a request from any person confined in a correctional institution or facility or a Whiting Forensic Division facility, for disclosure of any public record under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Correction or the Commissioner of Mental Health and Addiction Services in the case of a person confined in a Whiting Forensic Division facility, of such request, in the manner prescribed by the commissioner, before complying with the request as required by the Freedom of Information Act. If the commissioner believes the requested record is exempt from disclosure pursuant to subdivision (18) of subsection (b) of this section, the commissioner may withhold such record from such person when the record is delivered to the person's correctional institution or facility or Whiting Forensic Division facility.

(d) Whenever a public agency, except the Judicial Department, receives a request from any person for disclosure of any records described in subdivision (19) of

subsection (b) of this section under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Public Works of such request, in the manner prescribed by the commissioner, before complying with the request as required by the Freedom of Information Act. If the commissioner believes the requested record is exempt from disclosure pursuant to subdivision (19) of subsection (b) of this section, the commissioner may direct the agency to withhold such record from such person. In any appeal brought under the provisions of section 1-206 of the Freedom of Information Act for denial of access to records for any of the reasons described in subdivision (19) of subsection (b) of this section, such appeal shall be against the Commissioner of Public Works, exclusively, or, in the case of records concerning Judicial Department facilities, the Chief Court Administrator.

(e) Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of:

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency;

(2) All records of investigation conducted with respect to any tenement house, lodging house or boarding house as defined in section 19a-355, or any nursing home, residential care home or rest home, as defined in section 19a-490,

by any municipal building department or housing code inspection department, any local or district health department, or any other department charged with the enforcement of ordinances or laws regulating the erection, construction, alteration, maintenance, sanitation, ventilation or occupancy of such buildings; and

(3) The names of firms obtaining bid documents from any state agency.

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C. G. S. A. § 21a-261

§ 21a-261. Inspection of records. Entry on premises. Warrants and arrests

(a) Every person required by section 21a-254 to prepare or obtain and keep records of controlled substances, and any carrier maintaining records with respect to any shipment containing any controlled substance, and every person in charge, or having custody, of such records shall, upon request of the Commissioner of Consumer Protection and his authorized agents, permit said commissioner and his authorized agents at reasonable times to have access to and copy such records.

(b) For the purposes of verification of such records and of the enforcement of this part, said commissioner and his agents, are authorized to enter, at reasonable times any place, clinic, infirmary, correctional institution, caregiving institution, pharmacy, drug room, office, hospital, laboratory, factory, warehouse, establishment or vehicle in which any controlled substance is held, manufactured, compounded, processed, sold, delivered or otherwise disposed of and to inspect, within reasonable limits and in

a reasonable manner, such place, clinic, infirmary, correctional institution, care-giving institution, pharmacy, drug room, office, hospital, laboratory, factory, warehouse, establishment or vehicle, and all pertinent equipment, finished and unfinished material, containers and labeling, and all things therein including records, files, papers, processes, controls and facilities, and to inventory any stock of any such controlled substance therein and obtain samples of any such substance, any labels or containers for such substance and of any finished and unfinished material.

(c) No inspection authorized by subsection (b) shall extend to (1) financial data, (2) sales data other than shipment data, (3) pricing data, (4) personnel data or (5) research data and secret processes or apparatus.

(d) The Commissioner of Consumer Protection and his authorized agents are authorized and empowered to obtain and serve search warrants and arrest warrants; to seize contraband controlled substances; and to make arrests without warrant for offenses under sections 21a-243 to 21a-282, inclusive, if the offense is committed in their presence or, in the case of a felony, if they have probable cause to believe that the person so arrested has committed, or is committing, such offense. The commissioner and his authorized agents when executing the powers authorized pursuant to this subsection, except when using deadly physical force, shall be deemed to be acting in the capacity of a peace officer as defined in subsection (9) of section 53a-3.

C.G.S.A. § 21a-265

§ 21a-265. Inspection of prescriptions, orders, records and stocks restricted to government officers and third-party payors. Confidentiality

Prescriptions, orders and records required by sections 21a-243 to 21a-282 inclusive, and stocks of controlled substances shall be open for inspection only to federal, state, county and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to controlled substances, and to third party payors having a formal agreement or contract to audit such prescriptions, orders and records in connection with claims submitted to such payors. No such officer or third party payor having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a civil action or criminal prosecution in court or before a licensing or registration board or officer, to which action, prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party.

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C.G.S.A. § 38a-976

§ 38a-976. Definitions

As used in sections 38a-975 to 38a-998, inclusive:

(a) "Adverse underwriting decisions" means: (1) Any of the following actions with respect to insurance transactions involving insurance coverage which is individually underwritten: (A) A declination or termination of insurance coverage, (B) failure of an agent to apply for insurance coverage with a specific insurance institution which

the agent represents and which is requested by an applicant, (C) in the case of a property or casualty insurance coverage, (1) placement by an insurance institution or agent of a risk with a residual market mechanism, an unauthorized insurer or an insurance institution which specializes in substandard risks, (ii) the charging of a higher rate on the basis of information which differs from that which the applicant or policyholder furnished or (iii) changing a risk from a preferred rate program to a standard rate program or from a standard rate program to a nonstandard rate program within the same company or between two companies in the same group and (D) in the case of a life, health or disability insurance coverage, an offer to insure at higher than standard rates. (2) Notwithstanding the provisions of subdivision (1) of this subsection, the following actions shall not be considered adverse underwriting decisions: (A) The termination of an individual policy form on a class or state-wide basis, (B) a declination of insurance coverage solely because such coverage is not available on a class or state-wide basis, or (C) the rescission of a policy.

(b) "Affiliate" or "affiliated" has the meaning assigned to it in section 38a-1.

(c) "Agent" shall have the same meaning as "insurance agent" and "insurance producer" as defined in section 38a-702.

(d) "Applicant" means any person who seeks to contract for insurance coverage other than a person seeking group insurance that is not individually underwritten.

(e) "Commissioner" means the Insurance Commissioner.

(f) "Consumer report" means any written, oral or other communication of information bearing on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or expected to be used in connection with an insurance transaction.

(g) "Consumer reporting agency" means any person who: (1) Regularly engages, in whole or in part, in the practice of assembling or preparing consumer reports for a fee, (2) obtains information primarily from sources other than insurance institutions, and (3) furnishes consumer reports to other persons.

(h) "Control", including the terms "controlled by" or "under common control with", has the meaning assigned to it in section 38a-1.

(i) "Declination of insurance coverage" means a denial, in whole or in part, by an insurance institution or agent, of requested insurance coverage.

(j) "Individual" means any person who: (1) In the case of property or casualty insurance, is a past, present or proposed named insured or certificate holder; (2) in the case of life, health or disability insurance, is a past, present or proposed principal insured or certificate holder; (3) is a past, present or proposed policyowner; (4) is a past or present applicant or claimant; or (5) derived, derives or is proposed to derive insurance coverage under an insurance policy or certificate subject to sections 38a-975 to 38a-998, inclusive.

(k) "Institutional source" means any person or governmental entity that provides information about an individual to an agent, insurance institution or insurance-

support organization, other than: (1) An agent, (2) the individual who is the subject of the information, or (3) an individual acting in a personal capacity rather than a business or professional capacity.

(l) "Insurance institution" means any corporation, limited liability company, association, partnership, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society or other person engaged in the business of insurance, including health care centers, as defined in section 38a-175, medical service corporations, as defined in section 38a-214, managed care organizations, as defined in section 38a-478 and hospital service corporations, as defined in section 38a-199. It shall not include agents or insurance-support organizations.

(m) (1) "Insurance-support organization" means any person who regularly engages, in whole or in part, in the practice of assembling or collecting information concerning individuals for the primary purpose of providing the information to an insurance institution or agent for insurance transactions, including: (A) The furnishing of consumer reports or investigative consumer reports to an insurance institution or agent for use in connection with an insurance transaction, (B) the collection of personal information from insurance institutions, agents or other insurance-support organizations for the purpose of detecting or preventing fraud, material misrepresentation or material nondisclosure in connection with insurance underwriting or insurance claim activity, or (C) collecting medical record information from, disclosing medical record information to, or collecting medical record information on behalf of an insurance institution or agent in the ordinary course of business, including, but not limited to, utilization review companies, benefit management entities, including,

but not limited to, pharmaceutical benefit and disease management entities and information or computer management entities. (2) Notwithstanding subdivision (1) of this subsection, the following persons shall not be considered "insurance-support organizations" for purposes of sections 38a-975 to 38a-998, inclusive: Agents, government institutions, insurance institutions, medical care institutions, medical professionals, pharmacies, universities and schools.

(n) "Insurance transaction" means any transaction involving insurance primarily for personal, family or household needs rather than business or professional needs which involves: (1) The determination of an individual's eligibility for an insurance coverage, benefit or payment, or (2) the servicing of an insurance application, policy, contract or certificate.

(o) "Investigative consumer report" means a consumer report or portion thereof in which information about an individual's character, general reputation, personal characteristics or mode of living is obtained through personal interviews with the person's neighbors, friends, associates, acquaintances or others who may have such knowledge.

(p) "Medical-care institution" means any facility or institution that is licensed to provide health care services to individuals, including but not limited to health care centers, home-health agencies, hospitals, medical clinics, public health agencies, rehabilitation agencies and skilled nursing facilities.

(q) "Medical professional" means any person licensed or certified to provide health care services to individuals,

including but not limited to a chiropractor, clinical dietitian, clinical psychologist, dentist, nurse, occupational therapist, optometrist, pharmacist, physical therapist, physician, podiatrist, psychiatric social worker or speech therapist.

(r) "Medical-record information" means personal information which: (1) Relates to the physical, mental or behavioral health condition, medical history or medical treatment of an individual or a member of the individual's family, and (2) is obtained from a medical professional or medical-care institution, from a pharmacy or pharmacist, from the individual, or from the individual's spouse, parent or legal guardian or from the provision of or payment for health care to or on behalf of an individual or a member of the individual's family. The term does not include such information from which personal identifiers that either directly reveal the identity of the patient, or provide a means of identifying the patient, have been removed or have been encrypted or encoded such that the identity of the individual is not revealed without the use of an encryption key or code.

(s) "Person" has the meaning assigned to it in section 38a-1.

(t) "Personal information" means any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health or any other personal characteristics. "Personal information" includes an individual's name and address and "medical-record information" but does not include "privileged information".

(u) "Policyholder" means any person who: (1) In the case of individual property or casualty insurance, is a present named insured; (2) in the case of individual life, health or disability insurance, is a present policyowner, or (3) in the case of group insurance which is individually underwritten, is a present group certificate holder.

(v) "Pretext interview" means an interview where a person, in an attempt to obtain information about an individual, performs one or more of the following acts: (1) Pretends to be someone he is not, (2) pretends to represent a person he is not in fact representing, (3) misrepresents the true purpose of the interview, or (4) refuses to identify himself upon request.

(w) "Privileged information" means any individually identifiable information that: (1) Relates to a claim for insurance benefits or a civil or criminal proceeding involving an individual, and (2) is collected in connection with or in reasonable anticipation of a claim for insurance benefits or a civil or criminal proceeding involving an individual; provided information otherwise meeting the requirements of this subsection shall nevertheless be considered "personal information" under sections 38a-975 to 38a-998, inclusive, if it is disclosed in violation of section 38a-988.

(x) "Residual market mechanism" means an association, organization or other entity defined or described in sections 38a-328, 38a-329 and 38a-670.

(y) "Termination of insurance coverage" or "termination of an insurance policy" means either a cancellation or nonrenewal of an insurance policy, in whole or in part, for any reason other than the failure to pay a premium as required by the policy.

(z) "Unauthorized insurer" has the meaning assigned to it in section 38a-1.

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C.G.S.A. § 52-146o

§ 52-146o. Disclosure of patient communication or information by physician, surgeon or health care provider prohibited

(a) Except as provided in sections 52-146c to 52-146j, inclusive, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, as defined in subsection (b) of section 20-7b, shall not disclose (1) any communication made to him by, or any information obtained by him from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder or (2) any information obtained by personal examination of a patient, unless the patient or his authorized representative explicitly consents to such disclosure.

(b) Consent of the patient or his authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court, (2) by a physician, surgeon or other licensed health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to his attorney or professional liability insurer or such insurers agent for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care

provider in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with mental retardation is known or in good faith suspected.

Supreme Court, U.S.
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JUL 25 2002
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No. 02-14

In The

# Supreme Court Of The United States

NICHOLAS RUSSO,

*Petitioner,*

v.

STATE OF CONNECTICUT,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

## BRIEF IN OPPOSITION

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## JURISDICTIONAL STATEMENT

The petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257(a) which authorizes this court to review "[f]inal judgements or decrees rendered by the highest court of a state. . . ." Id. The Connecticut Supreme Court, however, remanded this case to the trial court for further proceedings which have not yet been held.

## COUNTERSTATEMENT OF THE CASE

After receiving information from the Hartford Police Department a diversion inspector with the federal Drug Enforcement Administration obtained records of what the state claims to be forged prescriptions from several pharmacies revealing that the defendant had obtained between 7,000 and 8,000 tablets containing Tylenol with codeine, a controlled substance under state and federal laws.

The defendant was subsequently charged in state court with multiple counts of forgery in the second degree and obtaining controlled substances by the forgery of prescriptions. Prior to trial, the defendant moved to suppress the prescription records obtained from the pharmacies. The trial court granted the motion. The state moved for a dismissal on the ground that it had insufficient evidence to proceed and, when the trial court granted the motion, the state appealed to the Connecticut Supreme Court.

The Connecticut Supreme Court reversed the judgment of dismissal and remanded this case to the trial court ". . . .with direction to deny the defendant's motion to suppress and for further proceedings according to law." State v Russo, 259 Conn. 436, 473, 790 A.2d 1132, 1156 (2002). (Pet. App. 41).

## REASONS WHY THE PETITION SHOULD BE DENIED

The judgment below is not a final judgment for the purpose of invoking this Court's jurisdiction. This jurisdictional issue is controlled by Florida v. Thomas, 532 U.S. 774 (2001) in which this Court held that a decision by the highest court of a state reversing a trial court's decision granting a motion to suppress and remanding the case for further proceedings is not a final judgment which this court has jurisdiction to review. This case does not fit any of the categories of exceptions to the final judgment rule set forth in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-483 (1975) and discussed in Florida v. Thomas, supra. The decision of the Connecticut Supreme Court is not determinative of the outcome of this case and it may be reviewed by this court if the petitioner is convicted after trial. While it might be argued that the fourth Cox category applies because although the petitioner might prevail on non federal grounds after remand and reversal of the Connecticut Supreme Court by this Court would preclude any further litigation, this category applies only where refusal to grant immediate review of a state court decision " . . .might seriously erode federal policy." Florida v. Thomas, supra, 532 U.S. 774; , 121 S.Ct. 1905, 1910. In light of Whalen v. Roe, 429 U.S. 589 (1977), in which this Court upheld New York statutes requiring that copies of all prescriptions for controlled substances be filed with the State of New York because of the federal and state policy to prevent the improper diversion and use of controlled substances, there is no such erosion of federal policy.

The Connecticut Supreme Court held that the records were obtained from several pharmacies with the consent of the pharmacists pursuant to a Connecticut statutory scheme controlling the distribution of controlled substances and providing for both the confidentiality of prescription records and their inspection by law enforcement officials. State v. Russo,

supra, 259 Conn. 436, 447-457 (Pet. App. 11-23). The holding on this issue consisted of factual findings and interpretation of Connecticut statutes by the Connecticut Supreme Court. The factual findings and interpretation of Connecticut Statutes should not be reviewed by this Court. Mullaney v. Wilbur, 421 U.S. 684, 690-691 (1975).

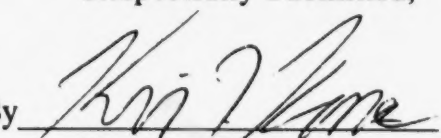
The court further held, relying on Whalen v. Roe, supra 429 U.S. 589, that under the circumstances here which included statutory restrictions on disclosure of this information by law enforcement officers, the defendant's constitutional rights were not violated. Id. 457-473 (Pet. App. 23-41). This was a proper application of the holding in Whalen v. Roe.

The petitioner has shown no compelling reason why this petition for certiorari should be granted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

By 

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